

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 *as representative of*)
12)
13 The Commonwealth of)
14 Puerto Rico, *et al.*) September 23, 2020
15)
16 Debtors,)
17)
18)
19)
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21)
22)
23)
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12 The Financial Oversight and) Docket No. 3:20-AP-00003 (LTS)
13 Management Board for)
14 Puerto Rico,)
15)
16 *as representative of*)
17)
18 The Commonwealth of)
19 Puerto Rico,)
20 Plaintiff,)
21)
22 v.)
23)
24 Ambac Assurance)
25 Corporation, *et al.*)
Defendants.)

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2
3 The Financial Oversight and) Docket No. 3:20-AP-00004 (LTS)
4 Management Board for)
5 Puerto Rico,)
6)
7 *as representative of*)
8)
9 The Commonwealth of)
10 Puerto Rico,)
11 Plaintiff,)
12)
13 v.)
14)
15 Ambac Assurance)
16 Corporation, *et al.*)
17)
18 Defendants.)

12
13 The Financial Oversight and) Docket No. 3:20-AP-00005 (LTS)
14 Management Board for)
15 Puerto Rico,)
16)
17 *as representative of*)
18)
19 The Commonwealth of)
20 Puerto Rico,)
21 Plaintiff,)
22)
23 v.)
24)
25 Ambac Assurance)
Corporation, *et al.*)
Defendants.)

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HEARING ON MOTIONS

BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ALL PARTIES APPEARING TELEPHONICALLY

For The Commonwealth
of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
Mr. Michael A. Firestein, PHV
Mr. Colin Kass, PHV

For Official Committee
of Unsecured Creditors: Mr. Luc Despins, PHV

For Ambac Assurance
Corporation: Ms. Atara Miller, PHV

For National Public
Finance Guarantee Corp.: Mr. Robert Berezin, PHV

For Assured Guaranty
Corp. and Assured
Guaranty Municipal
Corp.: Mr. William J. Natbony, PHV

For AmeriNational
Community Services, LLC,
and Cantor-Katz
Collateral Monitor, LLC: Mr. Douglas Mintz, PHV
Mr. Nayuan Zouairabani Trinidad, Esq.

Proceedings recorded by stenography. Transcript produced by CAT.

1	I N D E X	
2	WITNESSES:	PAGE
3	None.	
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5	EXHIBITS:	
6	None.	
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1 San Juan, Puerto Rico

2 September 23, 2020

3 At or about 9:04 AM

4 * * *

5 THE COURT: Good morning. This is Judge Swain
6 speaking.

7 MS. NG: Hi, Judge. It's Lisa.

8 THE COURT: Ms. Tacoronte, would you please announce
9 the case?

10 COURTROOM DEPUTY: Good morning, Your Honor.

11 THE COURT: Good morning.

12 COURTROOM DEPUTY: The United States District Court
13 for the District of Puerto Rico is now in session. The
14 Honorable Laura Taylor Swain presiding. God save the United
15 States of America and this Honorable Court.

16 For the record, case number 17-3283, *In Re: The*
17 *Financial Oversight and Management Board for Puerto Rico as*
18 *representative of the Commonwealth of Puerto Rico, et al.*
19 Adversary Proceedings 2020-03, 2020-04, and 2020-05 for motion
20 hearing.

21 THE COURT: Thank you, Ms. Tacoronte.

22 Again, buenos dias. Good morning, everyone. Welcome
23 counsel, parties in interest and members of the public and
24 press. Today's hearing is for oral argument on the motions
25 for partial summary judgment that have been filed as Docket

1 Entry No. 43 in Adversary Proceeding No. 20-003, Docket Entry
2 No. 40 in Adversary Proceeding No. 20-004, and Docket Entry
3 No. 55 in Adversary Proceeding No. 20-005.

4 To ensure the orderly operation of today's telephonic
5 hearing, all parties on the line must mute their phones when
6 they are not speaking. If you are accessing these proceedings
7 on a computer, please be sure to select mute on both the Court
8 Solutions dashboard and on your phone. When you need to
9 speak, remember that you must unmute on both the dashboard and
10 the phone.

11 I remind everyone that, consistent with court and
12 judicial conference policies and the Orders that have been
13 issued, no recording or retransmission of the hearing is
14 permitted by any person, including but not limited to the
15 parties, members of the public or the press. Violations of
16 this rule may be punished with sanctions.

17 I will be calling on each speaker during these
18 proceedings in the agreed order that is enumerated in the
19 Joint Informative Motion filed yesterday as Docket Entry No.
20 108 in Adversary Proceeding 20-003, filed as Docket Entry No.
21 101 in Adversary Proceeding 20-004, and Docket Entry No. 122
22 in Adversary Proceeding 20-005.

23 When I do call on you, please begin your remarks by
24 identifying yourself by name for clarity of the record. If
25 you wish to be heard out of order or otherwise need to make a

1 remark, please state your name clearly at the end of an
2 argument segment and request to be heard. And remember,
3 you'll have to unmute on both your phone and the Court
4 Solutions dashboard. Don't just use the wave function on the
5 Court Solutions dashboard, because I may not be able to see
6 that. I will respond to your request and will call on each
7 speaker if more than one person wishes to be heard and I am
8 granting the request.

9 Please don't interrupt each other or me during this
10 hearing. If we interrupt each other, it is difficult to
11 create an accurate transcript of the proceedings. But having
12 said that, and as usual, I apologize in advance for breaking
13 this rule, because I may interrupt if I have questions or if
14 you go beyond your allotted time. If anyone has difficulty
15 hearing me or another participant, please say something right
16 away.

17 The time allotments for each matter and the time
18 allocations for each speaker are set forth in the Joint
19 Informative Motion. I encourage each speaker to keep track of
20 his or her own time. The Court will also be keeping track of
21 the time and will alert each speaker when there are two
22 minutes remaining with one buzz, and when time is up with two
23 buzzes. Here is an example of the buzz sound.

24 (Sound played.)

25 THE COURT: If your allocation is two minutes or

1 less, you will just hear the final two buzzes.

2 When we take a break, I'll direct everyone to
3 disconnect and dial back in at a specified time. I'm planning
4 to call breaks at the end of the arguments by the movant and
5 parties supporting the motions, and then between the arguments
6 in opposition to the motions and the rebuttal arguments. If
7 an argument participant needs me to call a break at another
8 time, unmute on both your phone and the Court Solutions
9 dashboard and say something at an appropriate time.

10 The timing for today's proceedings is from 9:00 to
11 12:45 for the morning session, and then we will resume at 2:15
12 if necessary. I think that covers all of the logistics and
13 housekeeping issues, and so now we will turn to the oral
14 argument.

15 The first speaker is Mr. Bienenstock on behalf of the
16 Oversight Board, who has been allotted 68 minutes.

17 Mr. Bienenstock.

18 MR. NATBONY: Judge Swain, I'm sorry. This is
19 William Natbony on behalf of the Monoline Defendants. Before
20 we begin, defendants just had a quick request on time
21 allocations.

22 THE COURT: Yes.

23 MR. NATBONY: In view of our preparation, we realized
24 we were perhaps a bit optimistic in terms of the ability to
25 get through our arguments in the 96 of 120 allocated minutes

1 requested. As such, we would respectfully request that an
2 additional ten minutes be added to both Ms. Miller and myself
3 to be safe.

4 The overall time requested would still be within the
5 time allocated by the Court. So if granted, both Ms. Miller
6 and I would have 40 minutes, rather than 30 minutes, each, and
7 Mr. Berezin would follow with 20 minutes.

8 Thank you, Your Honor.

9 THE COURT: Thank you. And so that still keeps you
10 under the 120 minutes?

11 MR. NATBONY: Yes, Your Honor.

12 THE COURT: I'm sorry. Does anyone else wish to be
13 heard on that? I thought I'd heard another voice.

14 (No response.)

15 THE COURT: That request is granted. And so just to
16 confirm, Mr. Natbony for Assured will be allotted 40 minutes,
17 Ms. Miller for Ambac will be allotted 40 minutes, Mr. Berezin
18 will be allotted the 20 minutes that were requested, and the
19 DRA Parties will be allotted the 16 minutes that were
20 requested.

21 MR. NATBONY: Thank you, Your Honor.

22 THE COURT: Is that your intent?

23 MR. NATBONY: Yes, Your Honor. Thank you.

24 THE COURT: Thank you.

25 All right. Then we will open with Mr. Bienenstock.

1 Mr. Bienenstock, you need to unmute on both the
2 dashboard and your phone.

3 And Ms. Ng, would you do whatever you can do to
4 unmute from our end?

5 MR. BIENENSTOCK: Good morning, Your Honor. Can you
6 hear me now?

7 THE COURT: Yes, I can. Thank you.

8 MR. BIENENSTOCK: Okay. Then I just wanted to wish
9 the Court and all parties best of health and the end of the
10 situation as quickly as possible.

11 May it please the Court, my name is Martin
12 Bienenstock of Proskauer Rose, LLP, attorneys for the
13 Oversight Board, as the Title III representative of HTA and
14 PRIFA, and on behalf of C -- of HTA, and on behalf of PRIFA
15 and CCDA, which are not Title III debtors.

16 Your Honor, what I hope to cover in my 68 minutes,
17 and then my colleagues will cover the 56(d) issues later and
18 some ancillary issues that I may not get to, are largely
19 issues raised in the sur-replies, because the other issues
20 have been fully briefed. And on the issue of law of the case,
21 which defendants make an issue of in their sur-replies,
22 basically we're taking a very practical view.

23 While the Court has discretion to utilize its Stay
24 Relief Opinions as law of the case, we recognize two things:
25 First, the Court was very careful in those Stay opinions to

1 say it was ruling on whether the defendants had established
2 colorable claims; and second, as a practical matter, we don't
3 think the Court is going to enter a judgment here in the
4 summary judgment motions that the Court thinks is wrong.

5 So our position is simply this: We think the Court
6 was right in all of its reasoning that led to its Stay Relief
7 Opinions. The defendants have raised nothing since then to
8 demonstrate anything was wrong. And on that, and subject to
9 any questions, of course, the Court may have, I'm not going to
10 retread that ground on the security interest, property
11 interest, et cetera, except perhaps tangentially, with one
12 exception.

13 In the HTA Sur-reply, the defendants, starting at
14 approximately paragraph nine on page seven of their Sur-reply
15 Brief, make an argument that at least in respect of HTA, that
16 they have a security interest in the monies held in bank
17 accounts at the Commonwealth, because, as we understand their
18 logic, when the payment of the various taxes and license fees
19 came into the Commonwealth, they say they had a perfected
20 security interest in that. And when it was deposited into a
21 deposit account, the deposit account became proceeds of that.
22 And that would give them an exception to the rule that to have
23 a security interest, a perfected security interest in a
24 deposit account, you need a control agreement.

25 I will take just the next few minutes to point out

1 | why they are wrong. We understand, and I've laid out now the
2 | logic, that they have to allege something to get around the
3 | fact that they acknowledge and admit that they have no control
4 | agreement on the bank accounts of the Commonwealth, which
5 | would ordinarily prevent perfection. So the only thing they
6 | can say is its proceeds of something else in which they have a
7 | security interest.

8 | To do that, they have to show that the Commonwealth
9 | has authenticated their security interest in the money or
10 | other funds it takes in, which then gets converted into the
11 | deposit account. And what they say in their -- in paragraph
12 | nine is that all they have to show is that they had a security
13 | interest in a medium of exchange.

14 | What they leave out in the definition of "medium of
15 | exchange" is the Uniform Commercial Code requires that the
16 | medium of exchange has to be adopted by the government as a
17 | medium of exchange. And the government has not adopted
18 | deposit accounts as a medium of exchange, and they don't
19 | contend that it does. They just ignore that requirement.

20 | They have two problems in establishing their deposit
21 | accounts as proceeds of something they had a perfected
22 | security interest in. The first is they assume that the
23 | payments for the various license fees, gas taxes, cigarette
24 | taxes, et cetera, were made in cash, and there's no basis for
25 | that assumption. But let's even assume that they were right.

1 They then have to show that the Commonwealth has authenticated
2 the fact that it is holding that money for them, for the
3 creditor.

4 And if the Court -- the Court doesn't have to do this
5 now, but I'll just give the references. In 9 L.P.R.A. Section
6 2021 and in 13 L.P.R.A. Section 31751(a)(1), the Court will
7 see that the relevant statutes provide that the special
8 accounts that the monies go into are not held for the
9 creditors. They're held for HTA for its corporate purposes.

10 So the defendants fail the first test to establish
11 that the Commonwealth has authenticated the creditors'
12 security interest in what it receives as payment for the
13 various taxes and things that formally would ultimately
14 allocate it to HTA.

15 The next issue that I'm going to take up is the issue
16 that they raise that the statutes in Puerto Rico requiring the
17 Commonwealth to transfer monies to the three instrumentalities
18 are enforceable, notwithstanding *Ohio v. Kovacs*, in which the
19 Supreme Court ruled that the requirement, the statutory
20 requirement to either clean up a contaminated site or to pay
21 for the cleanup was simply a claim in bankruptcy.

22 The fundamental error that the defendants make is not
23 recognizing that all laws, whether statutes, common law, or
24 other sources of law are enforced by orders. And that was the
25 case in *Ohio v. Kovacs*. The common law and statutory law in

1 Ohio led to an order requiring the debtor, the ultimate
2 debtor, to pay for a cleanup.

3 The Supreme Court treated the claim as a statutory
4 claim. It said, "the State argues, however, that the
5 injunction it has secured is not a claim against Kovacs for
6 bankruptcy purposes, because Kovacs' default was a breach of
7 the statute, not a breach of the ordinary commercial contract,
8 which concededly would give rise to a claim. And Kovacs'
9 breach of his obligation under the injunction did not give
10 rise to a right to payment under the meaning of 101(4)(B). We
11 are not persuaded by either submission."

12 And then the Supreme Court goes on to say that, to
13 satisfy the purposes of the Bankruptcy Code claim, the word
14 "claim" has to have a broad definition, which would definitely
15 encompass the statutory obligation. So bottom line, the
16 Monolines' argument that Kovacs applies to orders and not
17 statutes is simply not right and logically doesn't make sense,
18 because all statutes, to enforce them, ultimately lead to
19 orders.

20 Now, the next argument I wanted to address is the
21 Monolines' argue that statutes cannot be rejected as executory
22 contracts and must be complied with. And they cite *Kentucky*
23 *Employees Retirement System*, a recent Sixth Circuit Court of
24 Appeals decision. They -- by doing that, they create the
25 illogical proposition that while a debtor may breach a promise

1 to pay, it may not breach something less, a promise to fund
2 another entity. Because that's what they want the
3 Commonwealth to do here, to fund HTA, PRIFA and CCDA.

4 The short answer to their rejection argument is these
5 statutes don't have to be rejected because rejection only
6 applies to executory contracts, and these statutory -- these
7 statutes are not executory. They are one-way obligations of
8 the Commonwealth to fund the three instrumentalities at issue.

9 The statutes here simply impose obligations on the
10 Commonwealth to transfer money to HTA, PRIFA and CCDA. No
11 performance by HTA, PRIFA or CCDA is required. Thus, the
12 statutes here start out as pre-petition claims against the
13 Commonwealth, so rejection is unnecessary to reduce the
14 statutes to claims. Thus, the statutes are already the
15 equivalent to pre-petition claims. They don't have to be
16 rejected.

17 Now, we recognize, and the defendants point out that
18 it was in our brief, that we mentioned the rejection power,
19 but we mentioned it in the context that these things result in
20 claims, the same as rejection does, not that the statutes were
21 executory contracts.

22 To best illustrate the fallacy of the Monolines'
23 argument, the Court only needs to consider its consequences.
24 The first consequence is that the Excise Tax Statutes in the
25 case of PRIFA would be the equivalent of nondischargeable,

1 specifically enforceable claims. The second consequence is
2 that not only the Excise Tax Statutes, but all Puerto Rico law
3 requiring debts to be paid, including the Puerto Rico
4 Constitution requiring the general obligation debt to be paid
5 first from all available resources would become
6 nondischargeable, specifically enforceable debt.

7 Puerto Rico, like all states and territories, also
8 has common law, such as contract law, entitling all
9 debtholders to enforce their debt contracts. Jurisprudential
10 law is no less enforceable than statutory law. So accepting
11 the Monolines' argument means all debt must be paid in full
12 because that's what Puerto Rico law says.

13 Unsurprisingly, the statutory and common law of all
14 states and territories requires that valid debt be paid. If
15 the Monolines are correct, we better notify all bankruptcy
16 judges and debtors across the United States that all debt must
17 be paid in full as long as local law requires it. This
18 argument dovetails with the Monolines' argument against
19 preemption, which I will address right after addressing the
20 citation to the *Kentucky Employees*, Sixth Circuit decision.

21 There, the Chapter 11 debtor in possession, Seven
22 Counties, was a designated member of the Public Retirement
23 System and became required to pay to the pension plan in 2014
24 an amount equal to 39 percent of each employee's salary. Even
25 at a 24 percent level, Seven Counties could not afford to

1 operate if it had to pay these pension contributions.

2 *Kentucky Employees* required the Chapter 11 debtor to
3 make the payments. The decision was entirely based on 28
4 U.S.C. Section 959(b). That section applied because Seven
5 Counties was held to be eligible for Chapter 11, unlike
6 municipalities which are ineligible pursuant to Bankruptcy
7 Code Sections 109(c) and (d).

8 To be a debtor under Chapter 11, the debtor must be a
9 railroad or a person, and "person" is defined by Bankruptcy
10 Section 101(41) to exclude governmental units like the
11 Commonwealth. *In re Jefferson County*, 484 B.R. 427, at page
12 433, holds that 28 U.S.C. 959 does not apply to municipal
13 debtors for several reasons, including Tenth Amendment
14 concerns and the practicality that, at the end of the day, any
15 enforcement action would require controlling the debtor
16 county's money, and that is automatically stayed.

17 There, the City of Birmingham and its mayor wanted to
18 sue to compel the debtor, Jefferson County, not to close
19 inpatient and emergency room services for the indigent.
20 Notably, neither *Kentucky Employees* nor *Jefferson County*
21 addressed statutes requiring a Chapter Nine debtor or Title
22 III debtor to make certain payments until certain pre-petition
23 bonds were paid in full. The statutes here require exactly
24 that.

25 Therefore, here one of the primary issues is whether

1 PROMESA, inclusive of its Title III, preempts those statutes.
2 As the Court knows from our briefs, PROMESA contains multiple
3 independent sources of preemption. They certainly include
4 PROMESA Sections Four, 108(a)(2), 202, 207 and Title III.

5 Now, the Monolines argue the Excise Tax Statutes are
6 not impliedly preempted. Starting in 1800, the United States
7 has enacted bankruptcy statutes. None of them up through the
8 current Bankruptcy Code includes express preemption language,
9 except as the Court has seen in Sections 903 and 904 of the
10 Bankruptcy Code and in Section 303 of Title III. It was never
11 necessary to have such express preemption language.

12 The Monolines' argument also proves too much, much
13 too much. The Excise Tax Statutes require the Commonwealth to
14 transfer certain excise taxes to PRIFA until PRIFA's bonds are
15 repaid. Puerto Rico's Constitution requires the
16 Commonwealth's General Obligation Bonds to be paid first from
17 all available resources, which include the excise taxes, when
18 there is otherwise insufficient revenues to pay all
19 appropriations. Puerto Rico's common law provides for
20 contract damages and the enforcement of judgments for contract
21 damages.

22 This is all to say the Monolines, without
23 exaggeration, are asking the Court to repudiate the last 220
24 years of bankruptcy law and jurisprudence by enforcing laws
25 requiring debt repayment in full, even during the debtors'

1 Title III case.

2 Aside from implied preemption, PROMESA contained
3 Sections Four, 108(a)(2), 202 and 207, which are totally
4 inconsistent with the enforcement of the Excise Tax Statutes,
5 or they're being rendered non-dischargeable. If all the
6 instrumentality debt and all the Commonwealth GO debt must be
7 paid in full because Title III does not expressly preempt all
8 those laws, then there's no restructuring available.

9 Moreover, PROMESA Title III does not grant the
10 priority to PRIFA and HTA'S claims against the Commonwealth
11 for appropriations. That is yet another inconsistency between
12 Title III and the Commonwealth law triggering preemption.

13 THE COURT: Mr. Bienenstock, I would just like to ask
14 you about the scope of the relief that you're asking for in
15 your preemption directed claim here in these partial summary
16 judgment motions. Are you saying that the budgets or the
17 general budgetary power of the Oversight Board under PROMESA
18 preempts any claim against the Commonwealth under these
19 transfer statutes completely, or that it is preempting any
20 obligation to pay in a particular period covered by the
21 particular budget?

22 MR. BIENENSTOCK: Your Honor, I thank you for raising
23 that. It was a point I was definitely going to get to
24 quickly. And I'd love to address it now, and obviously will
25 since Your Honor asked. And I appreciate the way Your Honor

1 | parsed and articulated the issues.

2 | We are most definitely requesting the latter relief
3 | Your Honor mentioned. Namely, that, among other reasons,
4 | PROMESA Section 202 preempts the Commonwealth's obligation to
5 | transfer money to the instrumentalities pursuant to those
6 | allocable revenue statutes in the briefs.

7 | The other issue Your Honor articulated was --

8 | THE COURT: Preempts that obligation for the period
9 | covered by the budget? Wipes it out entirely? Leaves it as
10 | something that might have to be made up in the future? That's
11 | what I'm trying to really understand.

12 | MR. BIENENSTOCK: Okay. In terms of eliminating the
13 | obligation, we're saying that it eliminates the obligation at
14 | a minimum for the period of the Fiscal Plan, which can be 20,
15 | 30, or 40 years. And, in fact, our Proposed Plan of
16 | Adjustment provides additionally that we have a whole list of
17 | statutes that we regard as being preempted, and ask, as part
18 | of the confirmation order, that the Court would rule on that.
19 | But for this purpose, and for this Summary Judgment Motion,
20 | we're saying that the obligation is totally preempted.

21 | Now, the statutes provide that the obligations last
22 | while the debt is outstanding. The debt, of course, will be
23 | dealt with in the Plan of Adjustment. So the period during
24 | which the debt will be outstanding is not going to be that
25 | long, but we are saying it's for the total period, or any

1 period we put in the Fiscal Plan and Budget, which has been a
2 pretty long period, because it has to provide for the future.

3 The second issue that the Court asked I think is, are
4 we saying it preempts the claim of the creditors against the
5 Commonwealth for not making those transfers to the
6 instrumentalities. And, as Your Honor knows, the defendants
7 have raised in their sur-replies that, in fact, they say it's
8 an excuse, a reason not to grant summary judgment, that we
9 have raised the possibility that they might have unsecured
10 claims. And I -- and these are precisely the claims we were
11 thinking of.

12 If -- in the case of these instrumentalities, we've
13 been referring to them in the briefs as the non-impairment
14 Puerto Rico statutory provisions. The Commonwealth has these
15 laws on its books, and they're all in the excerpts that we
16 filed for today, providing that the Commonwealth agrees to any
17 holder of the debt that it will not change these allocations
18 to reduce the taxes to below certain levels and will not
19 change the statutes adversely to the instrumentalities, HTA,
20 PRIFA and CCDA. Because these statutes expressly refer to a
21 commitment to the bondholders, we were acknowledging the
22 possibility that the bondholders might have an unsecured claim
23 for these statutes not being carried out or being preempted.

24 Now, the contrary argument would be that preemption
25 eliminates the statute so they can't have a claim. That

1 | really hasn't been briefed and wasn't one of the things on
2 | which we asked for summary judgment. Additionally, if they
3 | had an unsecured claim for that, what would be the amount of
4 | it? It's not -- they don't have a claim that the Commonwealth
5 | agreed to pay their debt. The Commonwealth was agreeing to
6 | transfer money to the instrumentality for its corporate
7 | purposes.

8 | So the amount of that claim might be very small, but
9 | whatever, it's not subject to the instant summary judgment
10 | motions, because we anticipated that if it ever comes down to
11 | the amount of that unsecured claim, there would need to be a
12 | hearing on disputed facts most likely.

13 | I hope that responds to Your Honor's inquiry.

14 | THE COURT: Most of it. I just have a follow-up
15 | inquiry.

16 | MR. BIENENSTOCK: Sure. Sure.

17 | THE COURT: So what do you mean when you are
18 | requesting disallowance of the claim as preempted? These are
19 | claims that have a figure on them and 50 pages of explanatory
20 | theory behind it. They haven't filed a separate claim for
21 | each theory.

22 | So are you looking for disallowance of the claim to
23 | the extent it's premised on preemption of a certain subset of
24 | the obligations, but not necessarily to wipe out this
25 | potential residual claim under the non-impairment covenant?

1 What do you expect me to do by way of a ruling in relation to
2 the claims as they have been filed?

3 And this is obviously a question that I could ask in
4 a variation for each of these causes of action, but what does
5 disallowance mean for purposes of this motion practice?

6 MR. BIENENSTOCK: Okay. Well, first and foremost, on
7 the counts we chose on which to ask for summary judgment is
8 that we're asking that the Court determine that there are no
9 secured claims for any of these things, because -- largely for
10 all the reasons and more that the Court mentioned in its Stay
11 Relief Opinions of September 9.

12 In terms of disallowance of unsecured claims, the
13 only unsecured claim that we're acknowledging need not
14 necessarily be disallowed as a result of these motions are the
15 unsecured claims for not carrying out the unimpairment
16 statutes.

17 THE COURT: Thank you.

18 MR. BIENENSTOCK: Okay. I just wanted to make -- I
19 hope that answered the Court's question.

20 The next issue that I was going to address is our
21 response to defendant's argument that the Commonwealth has no
22 right to default and that such a right would be a disputed
23 fact. Monolines argue the Commonwealth may not default
24 without legislation requiring default. Their Sur-replies make
25 it sound like the Commonwealth or any debtor's right to

1 default is a new epiphany. Of course it's not.

2 We trust the Monolines each understood that
3 commencing the Title III case would halt payments on unsecured
4 pre-petition debt. When we say the Commonwealth had a right
5 to default, we did not mean to say the Commonwealth could
6 default with impunity. We mean, generically, the Commonwealth
7 had a statutory, contractual duty to pay money and failed to
8 do it. It defaulted. Whether the Commonwealth has defenses
9 such as preemption is another issue.

10 Now, I do want to mention once for all of these
11 arguments that there is a genuine issue as to whether a
12 statute requiring an appropriation, or providing for an
13 appropriation or a transfer of monies to an instrumentality is
14 an enforceable claim, because governments appropriate money
15 and then they can change their mind and reappropriate
16 differently. And we've never heard of an instrumentality such
17 as HTA, et cetera, suing the government for changing its mind,
18 saying, no, you owed me a particular appropriation and now you
19 have to give it to me. But that's an issue that is not being
20 addressed in the summary, but here we're assuming for
21 argument's sake that they do lead to claims.

22 That the Commonwealth definitely had the right to
23 default is supported by the Supreme Court's decision in
24 *Faitoute Iron & Steel Company v. City of Asbury Park*, 316 U.S.
25 502, at page 511. The Supreme Court ruled, "the necessity

1 compelled by unexpected financial conditions to modify an
2 original arrangement for discharging a city's debt is implied
3 in every such obligation for the very reason that thereby the
4 obligation is discharged, not impaired."

5 Modifying an original arrangement euphemistically
6 means default and negotiate a restructuring. The Supreme
7 Court used the word "discharge" to mean satisfied under
8 bankruptcy law, not merely to mean a bankruptcy discharge of
9 liability.

10 The whole point of *Faitoute* was that the
11 restructuring of the municipality's debt under state law,
12 whereby less than full interest was paid, was not an
13 impairment of contractual obligations under the Contract
14 Clause, because the restructuring enabled the bondholders to
15 be paid the value or more than the value of their contractual
16 obligations. Without the restructuring, all they could do was
17 ask the legislature to raise taxes to pay them, which is the
18 same remedy the Monolines have here absent Title III.

19 The Monolines' Contract Clause arguments erroneously
20 assert the Contract Clause does not give rise to dischargeable
21 claims and erroneously hinge on nonmeritorious Contract Clause
22 claims. The Monolines' insistence that the Commonwealth may
23 not default without legislation authorizing the default
24 clearly arises from the Monolines' recognition that there
25 cannot be a Contract Clause violation without state or

1 territory legislation.

2 But where the Monolines and the Commonwealth part
3 company is the next step. Namely, whether a statute requiring
4 a default, no different from the Governor ordering a default,
5 impairs contractual obligations. The Monolines assume it
6 does, and that assumption is wrong.

7 The Contract Clause expressly refers to impairing the
8 "obligation of contracts." The Monolines' contractual rights
9 to have their bonds repaid were not impaired by the
10 Commonwealth's failure to pay timely and to default. Whatever
11 contractual obligations the Monolines could enforce before the
12 default and the legislation remain contractual obligations
13 they can enforce in Title III. In fact, the moratorium
14 legislation and executive orders went out of their way to
15 preserve all the Monolines' rights to principal and interest.

16 Insofar as the Monolines' rights to have the
17 Commonwealth transfer money to HTA, PRIFA and CCDA, the
18 Monolines always had the risk the Commonwealth would fail to
19 do so and never had any collateral security for a Commonwealth
20 default. But whatever rights the Monolines had to have the
21 Commonwealth transfer money to those entities still exists,
22 subject to preemption by PROMESA, a federal law.

23 On pages 285 through 289 of Your Honor's decision in
24 *Ambac Assurance v. Commonwealth of Puerto Rico*, at 297 F.
25 Supp. 3d. 269, the Court thoroughly analyzed the Contract

1 Clause claims arising out of the moratorium statutes and
2 orders and the Fiscal Plan. As the Court knows, in the Stay
3 litigation, the Monolines argued the First Circuit's
4 affirmance was on jurisdictional grounds and somehow gutted
5 this Court's rulings on the merits. But for present purposes,
6 that doesn't matter.

7 The First Circuit did not discuss the Contract Clause
8 claims and certainly did not criticize this Court's reasoning.
9 There is no reason for this Court today to analyze the claims
10 differently than it did in its affirmed decision.

11 This Court concluded at page 289, "plaintiff has thus
12 failed to meet its burden of pleading facts sufficient to
13 allow the Court to draw a reasonable inference that the
14 moratorium legislation, moratorium orders and Fiscal Plan
15 Compliance Act were unreasonable or unnecessary to effectuate
16 an important government purpose. And as claimed above,
17 plaintiff has failed to allege plausibly that the Fiscal Plan
18 is an exercise of Commonwealth legislative power.
19 Accordingly, the first claim for relief is dismissed," et
20 cetera.

21 Now, this Court --

22 THE COURT: Now, you're not moving here -- just one
23 second. Sorry, Mr. Bienenstock.

24 You're not moving here on reasonableness and
25 necessity; is that correct?

1 MR. BIENENSTOCK: I didn't hear the last part of the
2 question, Your Honor.

3 THE COURT: The motion here is not premised on lack
4 of a showing of reasonableness and necessity. The motion, as
5 I understand it, as against the Contract Clause claims is on
6 the question of whether there is an impairment; is that
7 correct?

8 MR. BIENENSTOCK: We didn't -- we didn't brief the
9 reasonableness and necessity issues, but we do believe that's
10 implicit. I mean, they're -- they pleaded less in their
11 Proofs of Claim than they did in the Stay litigation.

12 THE COURT: All right. I hear you.

13 MR. BIENENSTOCK: In this Court's September 9, 2020,
14 Opinion on Stay Relief Motions regarding HTA and PRIFA, the
15 Court ruled at page 16, "movants' proposed claims plainly stem
16 from their bond claims, and although styled as requests for
17 declaratory relief, ultimately are vehicles for asserting
18 rights to payment of amounts outstanding under various bond
19 issues. Indeed, movants identified their constitutional and
20 statutory theories in their Proofs of Claim as bases for their
21 claims for damages on account of defaults that occurred on the
22 relevant bonds."

23 In footnote 14 of that Opinion, the Court noted
24 "notably, although movants insist that their secured status
25 cannot be determined until the validity of the territorial

1 | legislation has first been resolved, nowhere do they explain
2 | how the relief they intend to seek through their proposed
3 | claims would have granted, provide them with a security
4 | interest that they do not otherwise have."

5 | Nothing has changed between then and now, Your Honor.
6 | The Monolines now contend the Contract Clause violations
7 | cannot be claimed because their only remedies are declaratory
8 | relief and equitable relief. If the Monolines are serious,
9 | they have now admitted they do not have Contract Clause claims
10 | within the meaning of Title III. That is good. Taking them
11 | at their word, they are not asserting secured claims or
12 | unsecured claims arising out of their allegations that the
13 | Commonwealth violated the Contract Clause.

14 | The Commonwealth submits there have been no Contract
15 | Clause violations in the first place, but before analyzing
16 | that for purposes of summary judgment, I want to explain why
17 | their assertions about only being entitled to declaratory and
18 | equitable relief are moot. Outside bankruptcy or Title III,
19 | it is understandable that if a state or territory enacts a law
20 | unconstitutionally impairing obligations of contract, the
21 | remedy is to strike the law, although striking or nullifying
22 | the law does not unimpair the contractual obligations. One
23 | would think the contract parties would also have a money
24 | claim, but the Monolines here say they only have rights to
25 | equitable and declaratory relief at page 24 of their Sur-reply

1 concerning PRIFA.

2 The reason we submit that nullifying the law is moot,
3 however, is that eliminating the moratorium laws and orders
4 has no, zero impact on the Commonwealth or HTA as Title III
5 debtors, because neither the Commonwealth nor HTA are required
6 to pay their pre-PROMESA and pre-Title III obligations until
7 the effectiveness of their plans of adjustment. And while
8 PRIFA and CCDA are not Title III debtors, they do not have the
9 money to pay bondholders. So HTA need not pay its bondholders
10 until its Plan is effected.

11 The Commonwealth may never need to transfer monies to
12 HTA pursuant to the pre-petition statutes requiring annual
13 transfers if those statutes are preempted. If they are not
14 preempted, at most they represent pre-petition obligations,
15 which are not payable until the effectiveness of the
16 Commonwealth's Plan of Adjustment.

17 Impairing contractual obligations by its terms shows
18 it leads to breaches of contract. The contracts here are bond
19 contracts for the payment of money, and according to the
20 Monolines, the statutes requiring the Commonwealth to transfer
21 monies to HTA, PRIFA and CCDA. The Monolines' concession,
22 however, that impairing contractual obligations does not give
23 rise to claims for payment of money is most welcome.

24 Second, though the Monolines deny it, the cause of
25 the Commonwealth not transferring money to HTA, PRIFA and CCDA

1 is Title III and PROMESA Section 108(a)(2), 202 and 207, among
2 others, not the moratorium statutes and orders. The Monolines
3 contend the Oversight Board is making a new argument by
4 alluding to federal law, but the Complaints allege, such as
5 PRIFA Complaint paragraph 134, federal law stopped payments to
6 the instrumentalities. Count 37 at page 64 is a count devoted
7 to the retention of PRIFA revenues being due to PROMESA.
8 Count 5 at page 48, retention of CCDA revenues per PROMESA.

9 Moreover, the Oversight Board's opening Summary
10 Judgment Briefs argued the retention of the revenues at issue
11 were due to PROMESA. For example, argument one of the PRIFA
12 Summary Judgment Motion Brief filed April 28 at page 32.
13 There is no basis on which the Monolines can have a secured
14 claim against the Commonwealth for its alleged default, and
15 there is no basis for a nondischargeable claim, because
16 Bankruptcy Code Section 944(b) and (c) list the only
17 nondischargeable claims in Title III, and so-called
18 constitutional claims are not on the list. Summary judgment
19 on those two points, unsecured and dischargeable, is clearly
20 warranted.

21 Outside Title III and PROMESA, debtors default all
22 the time. No one contends Chapter Nine debtors such as
23 Detroit, or Chapter 11 debtors such as JC Penney, Neiman
24 Marcus, Hertz Rent-A-Car are authorized to default by law.
25 Default means they are doing something contrary to a legal

1 obligation. The same as every human being is capable of
2 sinning, every debtor can fail to satisfy a legal obligation.

3 That is what Title III and Chapters Nine and 11
4 handle, defaults not allowed by law. Indeed, all debtors can
5 default. What if they lack the money to pay? They have to
6 default.

7 To create a material disputed fact, the Monolines
8 contend, whether the Commonwealth defaulted due to a
9 moratorium statute or another reason must be determined. But
10 whether the Governor picks up the phone and tells the
11 Secretary of Treasury not to make a payment, or the
12 Commonwealth legislature enacts a statute providing a payment
13 shall not be made makes no substantive difference, because
14 defaults for either reason leave intact the Commonwealth's
15 contractual obligations which the Monolines enforce by filing
16 Proofs of Claim.

17 Moreover, whether the Commonwealth may default is a
18 legal question, not a fact question. The Supreme Court
19 answered that question in the affirmative in *Faitoute*, which I
20 explained earlier. But even if the right to default were a
21 fact issue in dispute, the Contract Clause claims can be
22 determined without reference to the right to default for two
23 reasons. First, a default with or without legislation does
24 not impair contractual obligations, which is what the Contract
25 Clause protects.

HTA's contractual obligation to pay its bondholders was not eliminated by the Commonwealth's default or by any moratorium order or executive order requiring the default. The Commonwealth's obligation, if any, to transfer money to HTA, PRIFA and CCDA will be treated in the Commonwealth's Title III case. This Title III case will pay the Monolines the value of their contractual obligations from the Commonwealth, if they have any.

It is important to understand that the Contract Clause protection of contractual obligations does not convert bad debt into good debt. For instance, if a debtor is worth 600 dollars and owes ten creditors 100 dollars apiece, the value of each creditor's claim is 60 percent of its claim amount. The Contract Clause doesn't convert a claim worth 60 cents on the dollar into a claim worth 100 cents on the dollar.

Here, the Monolines' rights to obtain money from HTA, PRIFA or CCDA were dependent on each of those entities receiving money from the Commonwealth. Before PROMESA, the Commonwealth determined it needed to retain its money for other purposes. Congress determined the Commonwealth was in a fiscal emergency and could not provide effective services to its residents. Contract Clause did not eliminate the risk, which always existed. *Faitoute* provided, the Constitution is intended to preserve practical and substantial rights, not to

1 maintain theories.

2 Second, the Contract Clause claim depends, among
3 other things, on state legislation impairing contractual
4 obligations. Once PROMESA was enacted on June 30, 2016, and
5 the Oversight Board was appointed on August 31, 2016, many
6 provisions of PROMESA, a federal law, barring debt repayment,
7 among them are Section 207, under which the Oversight Board
8 has to approve any type of exchange, modification, repurchase,
9 issuance, redemption of debt. Section 202 granting budget
10 power over the -- to the Oversight Board --

11 THE COURT: Before you go on, Mr. Bienenstock, I'd
12 just like to stop at 207 for a minute.

13 MR. BIENENSTOCK: Yes.

14 THE COURT: So 207 doesn't include in its enumerated
15 list of actions requiring Oversight Board approval, ordinary
16 course repayment. It talks about modification. It talks
17 about redemption, which I understand colloquially to be
18 buybacks of the outstanding bonds, as opposed to paying P&I
19 amortization. But it's your position that even regularly
20 scheduled payments on bonds under 207, once PROMESA was
21 enacted and the Oversight Board came in, required specific
22 Oversight Board approval?

23 MR. BIENENSTOCK: Well, it includes, Your Honor, the
24 word "redeemed." I mean, the ordinary -- the ordinary course
25 payment is a redemption of that amount of the debt.

1 THE COURT: Thank you.

2 MR. BIENENSTOCK: But if for whatever reason the
3 Court does not agree with that interpretation, as I mentioned,
4 202, the power over the budgets, 108(a)(2), that they can't do
5 anything that, in the Oversight Board, impairs or defeats the
6 purposes of PROMESA, which would certainly be paying unsecured
7 pre-petition debt, and all of Title III, are reasons why,
8 absent any legislation, payment of the debt they want of the
9 obligations to the instrumentalities, if there were
10 obligations, was stopped. And that's the major point. So if
11 you take 207 out of the equation, it doesn't matter. There
12 are, you know, Title III, 202, 108(a)(2), there are lots more
13 reasons why the debt could not be repaid.

14 Now, the Monolines claim that the Oversight Board, as
15 a Commonwealth representative, cannot avoid liens as trustee
16 in bankruptcy under the Puerto Rico version of the Uniform
17 Commercial Code. They are wrong. First, PROMESA Section
18 301(c)(7) provides that when a Bankruptcy Code provision
19 incorporated into Title III uses the word "trustee," the word
20 "trustee" means Oversight Board. Second, PROMESA Section
21 301(a) incorporates Bankruptcy Code Section 544. The
22 Monolines seem to have concentrated on 544(a), but I'm
23 concentrating on 544(b)(1).

24 That provides a trustee, meaning the Oversight Board,
25 because it's incorporated into Title III, may avoid any

1 transfer of an interest of the debtor in property, or any
2 obligation incurred by the debtor, that is voidable under
3 applicable law by a creditor holding an unsecured claim that
4 is allowable.

5 Here, the applicable law is the Puerto Rico Uniform
6 Commercial Code. UCC Section 9-102(a)(52) defines lien
7 creditor to include a trustee in bankruptcy. Therefore, under
8 PROMESA Section 301(c)(7) and Bankruptcy Code Section
9 544(b)(1), the Oversight Board is a trustee and is authorized
10 to avoid any transfer voidable under applicable law by a
11 creditor holding an allowed claim. Thus, the Oversight Board,
12 in its capacity under Section 544 as a trustee, having the
13 status of a lien creditor pursuant to applicable law, the
14 Puerto Rico Uniform Commercial Code, can avoid security
15 interest junior to lien creditors. UCC Section 9-317(a)(2)
16 renders unperfected security interests junior to lien
17 creditors.

18 The Monolines also argued that Puerto Rico's
19 sovereign immunity bars the trustee's hypothetical and
20 judicial lien from attaching to Commonwealth property. In
21 response, the Commonwealth pointed out the Bankruptcy Code
22 Section 106, made applicable by PROMESA Section 301(a), waives
23 the Commonwealth sovereign immunity.

24 In their Sur-reply, the Monolines contradict
25 themselves. They argue that Section 106 only waives sovereign

1 immunity for actions against the Commonwealth. Aside from the
2 fact that Section 106 includes no such limitations, the
3 dispute is easily resolved by common sense. We, meaning me,
4 should never have engaged the Monolines on sovereign immunity
5 in the first place, as opposed to explaining why it does not
6 apply, which I will now do.

7 The Puerto Rico statutes and Puerto Rico sovereign
8 immunity protect it from judicial liens against its own
9 property. They are intended to do just that, protect the
10 Commonwealth. Here, the Commonwealth is being given a
11 judicial lien to defeat another creditor's security interest
12 in the Commonwealth's property. The hypothetical judicial
13 lien is not being used to seize the Commonwealth's property.
14 As such, sovereign immunity never even comes into play.

15 Put differently, the Monolines are asking the Court
16 to deploy sovereign immunity to deprive the Commonwealth of a
17 means to eliminate liens from its own property. That is the
18 reverse of common sense.

19 The Monolines also argue that *United States v.*
20 *Security Industrial Bank*, 459 U.S. 70, at page 75, shows it
21 would be unconstitutional to apply Title III retroactively to
22 avoid unperfected security interests in Puerto Rico. But the
23 Puerto Rico Uniform Commercial Code has always provided
24 unperfected security interests are junior to lien creditors.
25 Thus, this is not a retroactivity issue. The Commonwealth

1 | could simply grant someone else a lien and, under old law,
2 | that would be senior to the unperfected security interest.

3 | The Monolines argue the Commonwealth's using HTA to
4 | part with contract rights to appropriations from the
5 | Commonwealth is a transfer subject to PROMESA Section 407.
6 | The Monolines' premise is wrong. The Commonwealth has not
7 | caused HTA to part with contract rights. Nothing in the
8 | record shows the Commonwealth deprived HTA of contract rights.
9 | If HTA had contract rights or statutory rights to
10 | appropriations from the Commonwealth, it will have an allowed
11 | unsecured claim against the Commonwealth per such contract
12 | rights.

13 | As a practical matter, however, it may well be that
14 | instrumentalities such as HTA do not have rights to enforce
15 | appropriations, they are revocable gifts from the
16 | Commonwealth. If HTA does have enforceable rights, it will
17 | have a claim.

18 | The key point is there was no transfer for Section
19 | 407 purposes. Nothing caused HTA to transfer whatever rights
20 | it had to appropriations from the Commonwealth. Same for
21 | PRIFA and CCDA.

22 | The Monolines argue --

23 | THE COURT: Are you going on from 407 or are you
24 | continuing 407?

25 | MR. BIENENSTOCK: I'm continuing on 407.

1 THE COURT: Okay. At the end of your 407 argument,
2 I'll have a question for you about 407.

3 MR. BIENENSTOCK: Okay. Thanks, Your Honor.

4 The Monolines argue PROMESA Section 407 grants them a
5 claim under the first prong of 407 for monies the Commonwealth
6 failed to transfer to HTA, PRIFA and CCDA. The plain words of
7 Section 407's first prong require property of any territorial
8 instrumentality of Puerto Rico, is transferred in violation of
9 applicable law under which any creditor has a valid pledge,
10 pledge of security interest in or lien on such property, end
11 of quote.

12 The Commonwealth's property is not property of its
13 territorial instrumentality. Here, the Monolines simply
14 disagree with the Court's ruling that the Commonwealth's
15 property has not been transferred to HTA, PRIFA, CCDA or the
16 bondholders.

17 The Monolines' rationale for ignoring the plain words
18 of Section 407 is that then the Commonwealth's own unlawful
19 conduct, in the form of an unlawful transfer that prevents a
20 security interest from attaching, would immunize itself
21 against liability for that very unlawful conduct. Here again,
22 the Monolines are contending that the Commonwealth's mere
23 default -- it's not transferring money to HTA, PRIFA and CCDA
24 -- gives rise to a cause of action as if there were a transfer
25 and a remedy that requires payment in full. To state their

1 contention is to refute it, especially when the words of the
2 first prong of Section 407 already refute it.

3 The Monolines argue the second prong of Section 407
4 reads to the matter it does not read. Monolines contend the
5 second prong of 407(a) reads, while the Oversight Board for
6 Puerto Rico is in existence, if a violation of applicable law,
7 words they insert, deprives any -- skipping some words --
8 territorial instrumentality of property in violation of
9 applicable law, assuring the transfer of such property to such
10 territorial instrumentality for the benefit of its creditors,
11 then the transferee shall be liable for the value of such
12 property, end of quote.

13 The Monolines, however, simply misstate what the
14 second prong of Section 407 says. It says, "while an
15 Oversight Board for Puerto Rico is in existence, if any
16 property of any territorial instrumentality of Puerto Rico is
17 transferred in violation of applicable law which deprives any
18 such territorial instrumentality of property in violation of
19 applicable law showing the transfer of such property
20 to such territorial instrumentality for the benefit of its
21 creditors, then the transferee shall be liable for the value
22 of such property."

23 In short, the second prong of Section 407 protects
24 territorial instrumentalities and their creditors of wrongful
25 clawback. It protects them from getting the money and then

1 losing it due to wrongful clawback. But if they don't get it
2 in the first place, they can't transfer it, and there's no
3 cause of action under the second prong of Section 407.

4 The fallacy of the Monolines' reading of the second
5 prong of Section 407 is that, again, the Monolines interpret
6 the Commonwealth's simple failure to pay as a wrongful
7 transfer. What is clear is that a failure to pay may be a
8 default, but it's certainly not a transfer.

9 The Monolines point to House Report No. 114-602 in
10 year 2016 to argue that Section 407 applies to transferred
11 property creditors have or would have a pledge of or security
12 interest in. That argument fails for three reasons. First,
13 the "would have" language is contrary to the plain meaning of
14 the statute, which does not include the "would have" language.
15 There is no ambiguity in the statute justifying following a
16 deviation in the legislative history.

17 Second, the legislative history does not help the
18 Monolines. They ignored that the legislative history they
19 cite restricts itself to transfers of property between
20 instrumentalities. The Monolines are not complaining about
21 any transfers between instrumentalities. They complain about
22 the lack of a transfer from the Commonwealth to HTA, PRIFA and
23 CCDA.

24 So the Monolines are asking the Court to take a
25 sentence from the legislative history and, A, disregard the

1 first part about the transfers being between
2 instrumentalities, while, B, crediting the second part, using
3 the words "would have," which are nowhere found in the
4 statute.

5 Third, our prior point about the legislative history
6 cited by the Monolines being entitled to no weight because it
7 is inconsistent with the plain words of the statute is
8 corroborated by Congressman Grijalva's comments in the
9 Congressional Record, which the Monolines should have cited
10 but did not. Congressman Grijalva explained the following in
11 the June 9, 2016, Congressional Record at pages H3601-H3602.
12 I'll only quote a short part.

13 "But the addition of the language 'or would have' in
14 the Committee Report again reflects staff level text that was
15 not ultimately included in the version approved by the
16 Committee. The current text provides a cause of action for
17 creditors that, at the time of the alleged unlawful transfer,
18 in fact, had a pledge of, security interest in or lien on the
19 transferred property. Contrary to the suggestion of the
20 Committee Report, the provision does not permit such a cause
21 of action if the plaintiff only would have, in some future
22 circumstances, such an interest.

23 Indeed, the fact that the addition of the words like
24 'or would have' were discussed, but not ultimately included in
25 the text, is strong evidence that Congress did not intend for

1 such perspective contingent rights to be within the scope of
2 this provision. It would have been extraordinary to provide
3 certain creditors an argument that federal law establishes for
4 them a property interest where no such property interest
5 existed under the terms of the agreements they negotiated.
6 The Committee rightly declined to do so."

7 Monolines also argue that PROMESA Section 407 claims
8 are nondischargeable, because they are enforceable after stays
9 are no longer in effect. Bankruptcy courts frequently
10 terminate a stay to allow a creditor to liquidate its claim in
11 another court. That doesn't mean the claim escapes discharge.
12 Bankruptcy Code Sections 944(b) and (c) make clear all claims
13 are dischargeable.

14 Your Honor, that was the end of my Section 407
15 discussion.

16 THE COURT: Thank you. And I just want to come back
17 to 407(b). The 407 claim is not one that would be enforceable
18 until after the Stay is no longer in effect. And so in
19 seeking to strike the 407(b) claim now, are you seeking to
20 have me determine that there is -- the 407 claim, no possible
21 factual predicate for that claim ever, so that it would never
22 arise to be enforceable, and it should be dealt with now, even
23 though it's a claim that can't be brought now, continued or
24 something like that?

25 MR. BIENENSTOCK: Not entirely. What we're asking

1 for is -- the Monolines filed their Proofs of Claim, and they
2 included in those certain 407 claims. We are addressing the
3 407 claims they raised, and those are the 407 claims we're
4 asking the Court to rule on for the reasons we've provided.

5 And I guess implicitly, Your Honor, that would mean
6 that Your Honor is modifying the Stay to allow for the current
7 determination of the 407 claims asserted by the bondholders --
8 or by the Monolines.

9 THE COURT: Thank you.

10 MR. BIENENSTOCK: The Monolines contend the
11 invalidity of fiscal plans and budgets is a material, disputed
12 fact preventing summary judgment. First, the fiscal plans
13 form a blueprint between the Oversight Board and the Governor,
14 and the fiscal plans are not self-operative. They tell the
15 government what the Board wants it to do. The budgets
16 authorize spending. To the extent the Monolines have what
17 they call constitutional claims impacted by that spending,
18 nothing has prevented the Monolines from suing for Stay relief
19 or other remedies. They have already done so numerous times.

20 If, for instance, the Commonwealth determines the
21 budget is spending the Monolines' cash collateral, the Court
22 could grant Stay relief if the Commonwealth does not provide
23 adequate protection. None of this impacts the allowability of
24 the Monolines' claims at issue here.

25 Moreover, we now know the Monolines do not have

1 | secured claims, other than for certain monies in the accounts
2 | the Court identified in its Stay Relief Opinions. Now,
3 | however, it is clear the Monolines' collateral is restricted
4 | to those funds inside certain accounts. The Monolines do not
5 | agree, but unless the Court changes its mind, they have no
6 | Takings claims.

7 | The only other constitutional claims are Contract
8 | Clause claims. For those, the Monolines must show state or
9 | territorial legislation impairing contractual obligation. The
10 | Monolines allege the budgets are territorial legislation, but
11 | the budgets are neither territorial legislation, nor do they
12 | create Contract Clause claims.

13 | PROMESA puts the Oversight Board in charge of budgets
14 | and preempts Commonwealth law providing for budget
15 | expenditures. That is federal law. It's been held by this
16 | Court and affirmed by the First Circuit.

17 | The Contract Clause provides, no state shall pass any
18 | law impairing the obligation of contracts. The Commonwealth
19 | doesn't pass the budget. PROMESA deems the budget approved
20 | without the Commonwealth passing it. The budget is not
21 | Commonwealth legislation because it is created by the
22 | Oversight Board and PROMESA, federal law -- and PROMESA,
23 | federal law, deems it approved by the Governor and the
24 | legislature.

25 | THE COURT: Mr. Bienenstock, I --

1 MR. BIENENSTOCK: The Monolines contend PROMESA
2 Section --

3 THE COURT: I have a question for you about the
4 deemed approval and the relationship to legislation. Puerto
5 Rico is a political entity that has a structure. It has to
6 act by various components of its structure. PROMESA put the
7 Oversight Board into its structure, but through this provision
8 that a budget approval by the Oversight Board is deemed to be
9 approved by the legislature, hasn't Congress put the Oversight
10 Board into the position of doing a legislative act for this
11 particular limited purpose?

12 The statute doesn't just say the Oversight Board's
13 budget is the law. It says the Oversight budget is deemed to
14 have satisfied the ordinary structural requirements of Puerto
15 Rico law.

16 MR. BIENENSTOCK: Your Honor, this is, I guess, a
17 chicken and egg issue in that our point is that it's PROMESA,
18 federal law, that adopts the budget, and it imposes it on the
19 local legislature.

20 THE COURT: Thank you.

21 MR. BIENENSTOCK: And, you know, that's what Section
22 202 does. It's federal law, deems the budget approved.
23 It's -- Congress has done that.

24 And for the other -- I want to go on, but even if the
25 Court were to treat the budget as non-federal law, as

1 territorial law, for all the other reasons we've given,
2 there's still no Contract Clause violation. The budget only
3 authorizes expenditures.

4 The Monolines contend that PROMESA Section 303(3)
5 negates the preemption of the Puerto Rico statutes requiring
6 appropriations to HTA, PRIFA and CCDA. By its terms, Section
7 303(3) preempts unlawful executive orders, diverting funds
8 from one territorial instrumentality to another or to the
9 Commonwealth.

10 Thus, the words of Section 303(3) show the Monolines
11 are wrong for two reasons. First, only unlawful executive
12 orders diverting funds are preempted. In other words,
13 executive orders carrying out a certified budget would not be
14 illegal. Second, Section 303's carve-out of unlawful
15 executive orders, while not carving out certified budgets and
16 plans of adjustment, show Section 303(3) was solely intended
17 to and restricted to bar territories from engaging in their
18 own debt restructurings involving interdebtor transfers
19 outside of PROMESA in Titles III and VI.

20 And to the Monolines' point that PROMESA encourages
21 voluntary restructurings under Title VI and so Title III
22 shouldn't even be considered, the simple answer is Title VI
23 doesn't even allow for relief to restructure pension plans, of
24 which the Commonwealth has 55 billion dollars, automatic stay
25 and other relief. So clearly, PROMESA in no way suggests that

1 Title III is disfavored in favor of Title VI.

2 The Monolines argue the Excise Tax Statutes are not
3 impliedly preempted. Starting in 1800 -- I'm sorry, Your
4 Honor. I covered that already.

5 The Monolines argue that *Maine Community Health v.*
6 *United States*, at 140 S. Ct. 1308, shows the existence of an
7 obligation is not defeated by the absence of an appropriation.
8 The Commonwealth takes no issue with that proposition.
9 Whatever obligation the Commonwealth had is not eliminated by
10 the Oversight Board's Certified Budget's failure to
11 appropriate money to pay such obligations.

12 The Oversight Board has never argued that its failure
13 to budget payments of an obligation eliminates the obligation.
14 And, Your Honor, this is yet another -- it's an example of why
15 the budget, even if Your Honor treats it as territorial
16 legislation, is not the cause of any impairment of obligations
17 of contract. If the budget doesn't pay something, that
18 doesn't eliminate the obligation of the contract that it be
19 paid and doesn't eliminate the Monolines' rights to file
20 proofs of claim, which they have.

21 The Monolines, however, cite *Maine Community* for a
22 proposition that it does not support. Namely, that the
23 pre-PROMESA and pre-Title III appropriation statutes, such as
24 the Excise Tax Statutes, are not preempted by PROMESA and
25 Title III and are specifically enforceable and

1 nondischargeable. *Maine Community* says nothing about whether
2 PROMESA Sections Four, 108(a)(2), 202 and 207 in Title III
3 preempt Excise Tax Statutes or render them specifically
4 enforceable and nondischargeable.

5 I want to emphasize on this point, the Monolines
6 today and in prior hearings frequently cite Supreme Court and
7 other decisions where failures to make appropriations are met
8 with orders requiring the appropriations or the payment. And
9 that doesn't demonstrate that here, in Title III, the
10 Monolines are entitled to specific informance -- or
11 nondischargeability. All it demonstrates is that in all the
12 cases they've cited, including the ones at issue today,
13 they're outside of bankruptcy where the parties can, if they
14 have to, satisfy all obligations.

15 They also cite a 1892 case of *Ferris*. *Ferris*
16 provides, at page 546, "an appropriation per se merely imposes
17 limitations upon the government's own agents. It is a
18 definite amount of money entrusted to them for distribution,
19 but its insufficiency does not pay the government's debts, nor
20 cancel its obligations, nor defeat the rights of other
21 parties."

22 We agree with that wholeheartedly. Our budget's
23 failure to pay, for instance --

24 (Sound played.)

25 MR. BIENENSTOCK: -- an appropriation to HTA or PRIFA

1 doesn't eliminate any rights. It just -- it's not paid. And
2 those contractual obligations survive and can be the subject
3 of proofs of claim.

4 Finally, the Monolines contend they are secured in
5 the Commonwealth -- oh, I covered the bank account issue
6 already.

7 So, Your Honor, I think I might have a few extra
8 minutes, and unless the Court has further questions, I would
9 give those to my colleagues.

10 THE COURT: Fine. So there's a minute and a half
11 that will go to your -- the people who will speak after the
12 UCC? Is that what you want?

13 MR. BIENENSTOCK: Yes, please, Your Honor.

14 THE COURT: Very well, then. Thank you very much,
15 Mr. Bienenstock.

16 And I will now call on counsel for the UCC. Is that
17 Mr. Despins or Mr. Zwillingner?

18 MR. DESPINS: It's Luc Despins, Your Honor. Good
19 morning, Your Honor.

20 THE COURT: Good morning, Mr. Despins.

21 MR. DESPINS: So Your Honor, for the record, Luc
22 Despins with Paul Hastings on behalf of the Official Creditors
23 Committee.

24 As Your Honor knows, we filed the very specific
25 joinder in two portions of the Oversight Board's Motion and

1 Supporting Memorandum. And so we understand that today we
2 have a very limited supporting role, and, therefore, we will
3 not -- probably not use all the time allocated to us in the
4 opening section.

5 Most of the issues have already been covered by
6 Mr. Bienenstock. We just want to emphasize two issues, Your
7 Honor. The first one is emphasis on the Oversight Board's
8 Title III preemption argument, which is contained in paragraph
9 97 of Docket No. 56, filed on April 28. And, basically,
10 that's where the Oversight Board takes the position that the
11 argument that the statutes entitle the bondholders or others
12 to priority are preempted by Title III.

13 The point we want to make is that in the Response,
14 the Monolines and others argue that it cannot be that it was
15 automatic preemption, because Title III was never a sure
16 thing. It was a potential filing, but never a sure thing.
17 And therefore, there could not be automatic prevention --
18 preemption. I'm sorry.

19 And obviously we are now in Title III, so we're not
20 sure where that argument gets them. But more importantly, the
21 attempt to distinguish the cases cited by the Oversight Board,
22 such as *Detroit*, et cetera -- but in doing so, it's very clear
23 that they offer no cases. Not one case ever cited for the
24 proposition that state law or territorial law priorities are
25 enforceable in any bankruptcy context, Chapter 11, Chapter

1 Nine, or obviously PROMESA. And we believe that these are,
2 you know, compelling points.

3 Also, we wanted to emphasize the argument that their
4 constitutional claims are mere pre-petition unsecured claims,
5 but you've already practically ruled on that in your September
6 9th Order, so we're not going to repeat that. And therefore,
7 we would assign any remaining time in our time to
8 Mr. Firestein to the extent he needs it, Your Honor. Thank
9 you.

10 THE COURT: Thank you. I think there's seven minutes
11 and ten seconds left. Thank you very much, Mr. Despina.

12 So now I will turn to Mr. Firestein.

13 MR. FIRESTEIN: Good morning, Your Honor. Can you
14 hear me?

15 THE COURT: Yes, I can.

16 MR. FIRESTEIN: Excellent. Thank you, Your Honor.
17 Michael Firestein of Proskauer on behalf of the debtor, the
18 Commonwealth and the moving parties.

19 I know you heard the substantive arguments from
20 Mr. Bienenstock regarding the claims at issue, and some of
21 that spilled over into what is relevant and, more importantly,
22 not relevant in terms of what presents or couldn't present a
23 triable issue of material fact. And I agree with
24 Mr. Bienenstock, the defendants' views of what could be a
25 triable issue does not move the needle in terms of the

1 propriety of granting summary judgment on the claims at issue.

2 My purpose, along with Mr. Kass, is to discuss
3 certain Rule 56(d) issues and their lack of impact here. I
4 won't bury the lead. We do not believe the alternative relief
5 sought under 56(d) is well taken, or should prevent or defer
6 entry of partial summary judgment in favor of the Commonwealth
7 on the relevant claims.

8 Let me begin with what 56(d) is and is not. Rule
9 56(d) asks only whether defendants have had an adequate
10 opportunity to demonstrate if there are disputed issues of
11 fact. What this means is only if defendants can show they've
12 been denied the opportunity to present a material disputed
13 fact to an absence of ability to seek discovery, and such
14 facts are truly material to the issues presented, would Rule
15 56(d) be relevant.

16 This is a tall hurdle given everything that has
17 happened in recent motion practice and the prior findings of
18 the Court. Indeed, defendants spared no argument from being
19 exhaustively briefed in their oppositions, in my mind,
20 persuasively pointing to the conclusion that any further
21 discovery would be duplicative or cumulative, if material at
22 all.

23 The simple truth is the defendants do not need
24 additional discovery to respond to the motions, despite the
25 number of issues they attempt to raise. The material issues

1 necessary to these motions remain, and always have been,
2 issues of law grounded in relevant statutes, the undisputed
3 bond documents, and immutable facts. Indeed, the same
4 undisputed record that has been before the Court on prior
5 occasions, particularly within the claims --

6 THE COURT: I'm sorry.

7 MR. FIRESTEIN: Yes, Your Honor.

8 THE COURT: I'm sorry to interrupt your overview, but
9 you mentioned issues of law that are based on undisputed sets
10 of documents. With respect to PRIFA, the defendants have
11 argued that there are documents that are -- that the trust
12 documents that have been produced don't seem to be complete,
13 and they refer to what they think are some missing
14 supplemental agreements. And they are looking for discovery
15 to complete their reference set in aid of determining the
16 document-based arguments with respect to PRIFA.

17 What is your position as to that particular 56(d)
18 request?

19 MR. FIRESTEIN: I think that that's a makeweight
20 argument. This is the same Trust Agreement, Your Honor, that
21 they used in connection with the Lift Stay. And to now
22 suggest that perhaps the document upon which they were relying
23 at that time is now not the document that they think it is, I
24 think is not a basis upon which to deny summary judgment.
25 And, in fact, it's the source of the rights that they claim,

1 or one of the sources of the rights that they claim that they
2 have.

3 So if we're in a world in which the Trust Agreement
4 is not authentic or otherwise applicable, it's difficult to
5 see how they would withstand summary judgment in any event.

6 THE COURT: Thank you.

7 MR. FIRESTEIN: Bluntly, Your Honor, defendants have
8 not identified proper subjects for which discovery will
9 matter. Instead, what they do is try to convince the Court
10 that certain subjects are relevant, but they're not.

11 In any event, defendants' effort is procedurally
12 barred. Part of the standard in this Circuit is diligence.
13 If you don't act diligently, you can't satisfy Rule 56(d).
14 Regardless of posturing, defendants simply did not act in that
15 way. They were not denied an opportunity to take discovery or
16 precluded from doing so. They simply didn't do it, a fact
17 that they don't contest. Instead, they endeavor to provide
18 excuses for having done so.

19 That failing even to pursue discovery in advance of
20 the months that they had to prepare their oppositions points
21 to the absence of the need for it, particularly given the
22 hundreds of pages of briefing they submitted in opposition
23 regarding every conceivable argument, many of which have been
24 previously decided by this Court and alluded to by
25 Mr. Bienenstock.

1 Now, I know the Court has considered the substantial
2 briefing on the issues, including 56(d), but I want to
3 highlight several specific items in defendants' recent
4 submissions. They claim the process we use to address 56(d)
5 was procedurally improper. That's wrong and results form over
6 substance. Their 56(d) applications were chock-full of legal
7 authorities and merited a comprehensive response. It was not
8 just declarations. Indeed, a 56(d) request should be treated
9 as any other motion and responded to in kind.

10 There was no reasonable basis for the Court to avoid
11 the issue on this process point. It's no different than an in
12 limine or *Daubert* type motion that could be utilized in a Rule
13 56 summary judgment motion. This argument should be
14 disregarded because it's wrong. And importantly, I know the
15 Court desires to get to the merits of the gating issues.

16 Defendants also claim we are somehow objecting to the
17 timeliness of their filing. This is also wrong. The
18 Commonwealth's argument is that they should have sought
19 discovery long before the filing of the 56(d) in order to
20 satisfy the controlling First Circuit standard. That's the
21 timeliness, diligence point I made earlier. And on that,
22 again, they don't dispute the facts.

23 These defendants have never hesitated to pursue
24 discovery when they feel they need it, except here, and that
25 purposeful tactic should not be rewarded. It wouldn't have

1 | violated the Stay, and certainly not to at least ask to do it.
2 | Moving to lift the Stay for all kinds of things is a common
3 | practice in these Title III cases, something defendants have
4 | done repeatedly. They certainly weren't precluded from doing
5 | so, and frankly, they knew exactly how to ask for discovery,
6 | which they did, in fact, seek relative to the use of the Lift
7 | Stay discovery, in the context of summary judgment, to which
8 | we consented. This argument is not well-founded. They cannot
9 | be allowed to benefit by purposely sitting on their hands.

10 | They also claim in their Response they couldn't or
11 | shouldn't be required to identify the specific facts they
12 | seek, and they can be more general about the issues in
13 | question. That's contrary to First Circuit law. In the
14 | *Resolution Trust* case, the Court clearly notes, discovery
15 | sought under Rule 56(d) is not "ordinary," and is more
16 | restrictive than what is generally allowed under the Federal
17 | Rules.

18 | And the *Bad Paper* case, one of my favorite case
19 | titles, from the District of New Hampshire, indeed required
20 | the parties seeking relief to "identify the specific facts
21 | they seek or explain how the information sought would suffice
22 | to defeat summary judgment." They didn't do that here. We
23 | discussed that at length in our submission. And that does not
24 | satisfy the standard under 56(d).

25 | But I do want to give a few illustrations of what

1 they claim in their recent Response and why those issues don't
2 matter to the motions at hand. While not exhaustive, it's
3 illustrative of defendants' ill-conceived approach to Rule
4 56(d). Focusing on HTA, the defendants contend that the
5 Commonwealth's budgeting process and the certification of the
6 same by the FOMB supposedly raises factual issues they want to
7 pursue. It does not.

8 As Mr. Bienenstock noted, and we have pointed time
9 and again, this Court has repeatedly decided that 106(e)
10 precludes review of the budget certification decisions,
11 including whether the Fiscal Plan complies with Section 201.
12 No discovery on this issue is going to move the needle on
13 summary judgment, and it isn't allowed here, a position made
14 clear as well in our Response to the separate statement claims
15 that they make.

16 Similarly, defendants claim they need to take
17 discovery into the reasoning behind the default by the
18 Commonwealth and its failure to remit the allocable revenues
19 to, in this case, HTA, but equally applicable to PRIFA or,
20 frankly, CCDA. But the reason for the default is of no moment
21 to this motion. The question is whether there's a legal
22 consequence for having done so, not that it occurred.

23 We say there's no consequence because they have no
24 secured status on the retained money in question. So the
25 reason for the retention is immaterial to the issues

1 presented. And this is a legal issue flushed out in the
2 briefs for which no discovery would benefit the evaluation.

3 To be clear, why some government employee may have
4 determined to retain the monies is not germane to the legal
5 issues presented on the nature, if any, of their liens. The
6 question is whether it having been done has a legal
7 consequence. We submit it does not.

8 Likewise, defendants claim that the mere issue of
9 clawback, or the propriety of same, or its trigger is not
10 legal in nature but requires considerable fact discovery. It
11 does not, as argued in the briefing.

12 This issue principally relates to the Contract
13 Clause, but none of the discovery claimed will, for example,
14 alter the legal issue that, one, PROMESA caused the
15 impairment, if any, in the contracts to which defendants are
16 parties between HTA, for example, and the defendants; or two,
17 that the available resources for the Commonwealth were
18 sufficient to pay the billions of dollars of debt owed on the
19 Commonwealth's GO burden.

20 And a moment of digression, Your Honor, regarding the
21 Court's comments concerning the nature of the motion that's
22 been filed and manner in which the Contract Clause claims have
23 been challenged. You inquired of Mr. Bienenstock as to
24 whether the issue of "reasonable and necessary" was a part of
25 the motion. Mr. Bienenstock's response was that it was

1 implicit within the claims. Whether it is or not implicit,
2 it's not necessary to assess the issues that are capable of
3 resolving these matters at summary judgment.

4 The fact is that, in the briefing that we've
5 submitted in connection with these matters, there are separate
6 and independent legal grounds upon which the Court can
7 disallow the Contract claims in their entirety, as I've
8 noticed -- as I've indicated.

9 THE COURT: And so you're saying that --

10 MR. FIRESTEIN: And for the same reasons -- yes, Your
11 Honor?

12 THE COURT: Are you saying that I can disallow the
13 Contract Clause claims without reaching the clawback issue or
14 the question of whether there is a factual predicate for the
15 assertion that the clawback has been triggered?

16 MR. FIRESTEIN: Yes. Yes. And to be more fulsome in
17 connection with that, that is exactly the point that was made
18 in the briefing.

19 Indeed, one functional and independent ground is
20 if -- even if the Court were to consider that there was an
21 impairment, something with which we disagree, but if there was
22 to be a finding of any kind of impairment, our view under the
23 law is that that impairment would have been caused by PROMESA
24 for the reasons that have been articulated by Mr. Bienenstock.
25 And as a federal law, it is not subject to scrutiny under the

1 Contract Clause. So without regard for anything else, that
2 would be a basis upon which to disallow the Contract Clause
3 claims.

4 THE COURT: And even --

5 MR. FIRESTEIN: And -- yes, Your Honor.

6 THE COURT: -- as to CCDA, there wouldn't be a
7 necessity to reach the clawback issue?

8 MR. FIRESTEIN: So CCDA, Your Honor, I'm going to
9 yield to my partner, Mr. Kass, who's going to address, I
10 believe, that exact issue and how it applies relative to CCDA.
11 I expect that he will address that head on.

12 THE COURT: Thank you.

13 MR. FIRESTEIN: But let me just conclude that for
14 similar reasons, Your Honor, this Court has already ruled,
15 another area in which they seem to suggest a need to procure
16 discovery into accounting practices or government decisions on
17 the flow of funds, I submit, Your Honor, that does not impact
18 the legal determination presented here about whether
19 defendants have secured claims based on official documents,
20 resolutions, or statutes.

21 Those are the issues, and accounting practices do not
22 affect them for the exact reasons that the Court identified in
23 the preliminary ruling. And I believe this was specifically
24 included in the PRIFA preliminary ruling, but certainly has
25 larger application.

1 The simple point is that throwing up dust about
2 issues of interest to defendants does not mean that if
3 discovery were permitted, it would shed material light on
4 whether, with respect to the revenues retained by the
5 Commonwealth, there was a statutory lien, a security interest,
6 much less a perfected one, ownership or trust interest in
7 favor of defendants, or a defense to the 407 claims or the
8 Contract Clause claims. That's what's at issue here.

9 Fundamentally, without that materiality link, the
10 academic inquiries posed have no effect on the pending Summary
11 Judgment Motions. Accordingly, Your Honor, the 56(d) request
12 should be denied and summary judgment granted on the claims in
13 question for each defendant.

14 Now, as Your Honor asked regarding the CCDA issues,
15 I'm going to, if I can, Your Honor, yield the rest of the time
16 to my partner, Mr. Kass, who will make some observations on
17 that and a few related matters, unless the Court has any
18 questions.

19 THE COURT: No. That's fine. Thank you very much,
20 Mr. Firestein.

21 MR. KASS: Good morning, Your Honor. Colin Kass for
22 the Oversight Board.

23 THE COURT: Good morning.

24 MR. KASS: Good morning.

25 Following up on what Mr. Firestein just said, I'd

1 like to address a few points specific to CCDA. As an initial
2 matter, it is important to focus on what defendants claim they
3 need additional discovery for and what they do not. In their
4 56(d) Declaration, they do not claim they need any additional
5 discovery for their statutory lien claim, their ownership
6 claim, their express statutory or constructive trust claims,
7 or on the issue of perfection. Rule 56(d), therefore, cannot
8 prevent the grant of summary judgment as to those claims.

9 Defendants' only response to this is that they have
10 not yet filed an answer or counterclaim, but there is nothing
11 in Rule 56(d) or elsewhere that renders the filing of an
12 answer or counterclaim relevant. A counterclaim, by
13 definition, relates to claims other than the ones at issue in
14 our Motion. And if their 56(d) Declaration cannot show that
15 discovery is essential to decide our Motion, an answer will
16 not fill that gap.

17 Now, with respect to the claims for which they say
18 they do need additional discovery, those arguments are
19 meritless. First, they say they need additional discovery as
20 to the identity of the transfer account. This issue goes
21 primarily to the existence and scope of a security interest.
22 But as we explained in our Reply papers, we agree that the
23 identity of the transfer account is a triable issue. We are,
24 therefore, not seeking summary judgment disallowing a claimed
25 security interest as to funds that had been deposited into

1 what is ultimately determined to be the transfer account.

2 That fact, however, does not preclude the grant of
3 partial summary judgment on defendants' security interest
4 claims, particularly for funds that defendants claim should
5 have been but were not deposited into the transfer account.
6 As such, discovery concerning the identity of the transfer
7 account is not essential to determine partial summary judgment
8 on the Commonwealth -- in the Commonwealth's favor.

9 Second, defendants claim that they need discovery for
10 purposes of their Section 407 claim, but they concede that the
11 vast bulk of the funds at issue, over a hundred million
12 dollars, have been segregated in the FirstBank account. And
13 so there is no transfer to the Commonwealth. No discovery is
14 necessary under Rule 56(d) to grant partial summary judgment
15 as to those funds.

16 THE COURT: They do claim that there was some
17 transfer back to the Commonwealth, don't they? In CCDA, there
18 is some noise about some amounts of actual transfers?

19 MR. KASS: Correct, and I'm about to address that.

20 THE COURT: Thank you.

21 MR. KASS: So defendants identify a single
22 post-PROMESA transfer of 15 million dollars, and they say
23 discovery may show additional post-PROMESA transfers to the
24 Commonwealth. Now, as to the need for discovery, defendants
25 already have all the relevant post-PROMESA account statements

1 from the relevant accounts, and they have not identified any
2 additional transfers to the Commonwealth. So their request
3 for Rule 56 discovery relating to funds other than the 15
4 million dollar transfer rests on sheer speculation --

5 (Sound played.)

6 MR. KASS: -- and should be denied.

7 Now, as to the 15 million dollar transfer, there are
8 many reasons why the Court can and should grant summary
9 judgment as a matter of law. Most importantly, as this Court
10 held in the Lift Stay proceedings, the occupancy taxes are the
11 property of the Commonwealth, and the Commonwealth has never
12 relinquished its ownership of these funds to the transfer --
13 to the Tourism Company. So there is no deprivation of an
14 instrumentality's property.

15 To the extent the Court decides a Section 407 claim
16 on this basis, again, Rule 56(d) discovery is simply
17 unnecessary, and defendants do not argue otherwise. Now, if
18 the Court goes beyond that, then the Section 407 claim fails
19 both for preemption and because of the clawback under Article
20 VI, Section Eight. Those issues were largely addressed by
21 Mr. Bienenstock and Mr. Firestein, but with respect to the
22 Court's specific question on the clawback issue, the
23 defendants' argument is based on a faulty premise of law.

24 The triggering event under the Constitution is that
25 appropriations exceed available resources. That is the only

1 | issue that is necessary for the Court to determine, and that
2 | can be determined on undisputed facts. The last dollar
3 | defense that they have is statutory in nature and cannot
4 | override the constitutional provision. And so facts relating
5 | to the last dollar defense, which is what the defendants are
6 | seeking as part of their Rule 56(d) Motion, is simply
7 | irrelevant.

8 | For that reason, defendants cannot show on the
9 | existing record that additional discovery is essential to
10 | deciding the Commonwealth's Summary Judgment Motion, and for
11 | that reason, the request should be denied.

12 | Thank you, Your Honor.

13 | THE COURT: And is your argument that it's undisputed
14 | as a matter of fact that appropriations exceed available
15 | resources dependent on, first, taking the Congressional
16 | finding as an evidentiary fact, and second, assuming that the
17 | entire outstanding GO obligation was accelerated, that there
18 | is a 17 billion dollar figure implicit in the
19 | appropriations test for each and every year?

20 | MR. KASS: Your Honor, I think our position -- so the
21 | answer to the question is yes, that is true. I don't know
22 | that it is dependant on the finding of acceleration. If the
23 | Court concludes that acceleration is appropriate, then there's
24 | no question, and even the defendants would agree that
25 | appropriations exceed available resources. But even if that

1 is not the case, the fact that the GO debtholders are not
2 being paid, and have not been paid in full, is evidence that
3 they -- is undisputed evidence that appropriations cannot
4 exceed -- that appropriations exceed available resources.

5 THE COURT: Thank you.

6 So did the two beeps beep? I think --

7 MR. KASS: I heard --

8 (Sound played.)

9 THE COURT: Oh, now they have. I'm sorry. Had I
10 prevented you from making a last point, if you have one?

11 MR. KASS: You did not, Your Honor. I think that
12 completed my discussion.

13 THE COURT: All right. Thank you very much,
14 Mr. Kass.

15 So this concludes the arguments in support -- the
16 opening arguments in support of the Motion. We will now take
17 a 12-minute break. And so I would ask that everyone hang up,
18 and then call back in at 10:55. And then we will proceed with
19 the arguments of the objecting parties in opposition.

20 Thank you. Talk to you shortly. We're adjourned.

21 (At 10:43 AM, recess taken.)

22 (At 11:03 AM, proceedings reconvened.)

23 THE COURT: Good morning. This is Judge Swain.

24 MS. NG: Good morning, Judge. It's Lisa.

25 THE COURT: Very well. I'm ready to continue hearing

1 the arguments, and next up is Mr. Natbony, who is allotted 40
2 minutes for Assured.

3 MR. NATBONY: Thank you, Your Honor. Can you hear
4 me?

5 THE COURT: Yes, I can. Good morning.

6 MR. NATBONY: Thank you. Good morning, Your Honor.
7 May it please the Court. William Natbony from Cadwalader,
8 Wickersham & Taft, LLP, speaking this morning on behalf of the
9 Monoline Defendants.

10 And first, Your Honor, I certainly hope that all
11 counsel, Your Honor, and the court staff are doing well and
12 staying safe during these unusual times.

13 THE COURT: Thank you. And that is my hope for
14 everyone as well.

15 MR. NATBONY: So, Your Honor, plaintiff's motions
16 before the Court relate to a limited number of similar causes
17 of action asserted against each Monoline Defendant and the
18 Trustee. I will be addressing generally the application and
19 procedural issues pertaining to Rule 56(d), the existence of
20 issues of material fact as relates to the HTA bonds. Towards
21 that end, like the Board, it is not our intention to argue
22 issues of law already decided by the Court in the Lift Stay
23 Motions, though we respectfully disagree with a number of
24 those rulings and are moving forward with appeals.

25 After me, Ms. Miller will then address Section 407,

1 | preemption, and the existence of factual issues for PRIFA and
2 | CCDA. And Mr. Berezin will then address plaintiff's claims
3 | concerning the Contract Clause causes of action.

4 | Your Honor, plaintiff's motion essentially depends
5 | upon two flawed premises. First, plaintiff argues that the
6 | Court's prior Lift Stay decisions require the extreme and
7 | extraordinary relief of summary judgment here. And second,
8 | plaintiff contorts the purpose and requirements of Rule 56(d)
9 | in a manner wholly inconsistent with applicable law. I will
10 | address each flaw in turn and attempt to address a number of
11 | the arguments that Mr. Bienenstock made for the first time in
12 | his argument.

13 | The plaintiff asserts, Your Honor, that summary
14 | judgment is appropriate for certain counts because Your
15 | Honor's prior Lift Stay decision concerning the existence of
16 | property issues and interests controls here and prevents the
17 | existence of material issues of fact. We disagree.

18 | The parties have extensively briefed the issues
19 | surrounding construction and interpretation of the Excise Tax
20 | Statutes and the existence of a trust relationship, and we
21 | believe there is ambiguity and a need for discovery. But Your
22 | Honor has expressed a prior view on these issues, and although
23 | we respectfully disagree, we are going to rely on the briefs
24 | for them. But both this Court and the Board do agree that
25 | defendants, in fact, have a security interest in excise taxes

1 | that actually reach the Fiscal Agent account. And the Board
2 | admits as much, and admits specifically that the 2002 security
3 | agreement which applies to all funds, quote, required to be on
4 | deposit, not only deposit -- and other documentation create
5 | that security interest. But if monies had been in the Fiscal
6 | Agent accounts or should have been, nothing in the Court's
7 | prior decision is inconsistent with a finding that defendants
8 | have security interests. So in a sense, even under the
9 | Court's prior rulings, the issue is really the size of our
10 | secured claim measured by the quantity of excise taxes that
11 | reach the Fiscal Agent accounts, and not whether we have a
12 | secured claim.

13 | The Court's Lift Stay decisions, at least with
14 | respect to HTA and PRIFA, are premised on the fact that no
15 | excise taxes reached the Fiscal Agent accounts, and therefore,
16 | the Commonwealth, rather than the HTA, had control over those
17 | taxes. But the real question here is why did the funds not
18 | reach those accounts? And as we demonstrate in the briefing,
19 | the concept of control requires more than physical possession.
20 | It requires lawful domination and control.

21 | Now, plaintiff says that the reason excise taxes are
22 | not reaching the Fiscal Agent accounts is because the
23 | Commonwealth is breaching the excise taxes and has a right to
24 | do so. Well, if the Commonwealth was not permitted to breach
25 | the excise taxes -- Excise Tax Statutes, then the flow of

1 funds into the Fiscal Agent accounts must resume and the size
2 of our secured claim necessarily increases.

3 So the issues of why such breach is occurring and
4 what is the Commonwealth's rationale for the breach remain
5 issues that must be eventually decided by this Court on a full
6 record and are issues that raise genuine issues of fact.
7 Indeed, the validity of the underlying rationale to the
8 admitted breaches remains very much in dispute.

9 The Board has been all over the place as to why, you
10 know, the funds are not getting to the account. They do
11 introduce a new theory in their Reply that the Commonwealth
12 doesn't have to comply with the Excise Tax Statutes because of
13 a right to default or a determination to breach. Of course,
14 that argument by its nature admits that the Commonwealth has
15 defaulted or breached an obligation. But this new basis
16 replaces the original one, which was advanced in the Summary
17 Judgment Motion, which was that the Moratorium Orders, laws,
18 orders, fiscal plans and budgets caused the Commonwealth not
19 to comply. But as we established in the opposition, debtors
20 must comply with all valid state and territorial laws.

21 The Board refutes -- now we did --

22 THE COURT: So Mr. Natbony, are you arguing that if
23 there is a law on the books, notwithstanding bankruptcy, the
24 beneficiary of that law is entitled to specific performance
25 under all circumstances?

1 MR. NATBONY: Our position would be that the statute
2 that requires that, they do have an obligation to comply with
3 state law. And the fact of the matter is that the
4 government's reliance on *Kovacs*, which they cite for the
5 proposition that statutory obligations basically can be
6 discharged, doesn't really say what it says. And that's their
7 reliance on the point that Your Honor is raising.

8 So Mr. Bienenstock, for instance, argued that the
9 Commonwealth's ongoing obligation, you know, is equivalent to
10 the money judgment at issue in *Kovacs*, because the Excise Tax
11 Statutes could be enforced by court order. But *Kovacs* is
12 clearly distinguishable. In *Kovacs*, certain statutory
13 obligations had already been reduced to a monetary judgment
14 pre-petition, so it was that pre-petition money judgment, not
15 the statutory obligations themselves, that the Court found to
16 give rise to a right of payment constituting a claim under the
17 Bankruptcy Code.

18 And the Court specifically emphasized that, aside
19 from this pre-petition money judgment, the debtor was
20 otherwise required to comply with statutory obligations going
21 forward, including in the post-petition period. That's the
22 situation here. Here, unlike in *Kovacs*, there is no
23 pre-petition money judgment. There is just the Excise Tax
24 Statutes themselves, which the Commonwealth must comply with.

25 Moreover, as already argued in paragraph four of our

1 Sur-Reply, if defendants did obtain a court order to enforce
2 the Excise Tax Statutes, that order would not be a money
3 judgment requiring the Commonwealth to pay a debt. It would
4 be a writ of mandamus specifically enforcing the
5 Commonwealth's ministerial, nondiscretionary obligation to
6 transfer the taxes to HTA for the benefit of the bondholders.

7 Now, also --

8 THE COURT: Just one moment.

9 MR. NATBONY: Yes, Your Honor.

10 THE COURT: If the Board is right on the law, and
11 you're saying they're not, but if the Board is correct on the
12 law regarding the ability, I suppose, not to comply with the
13 statute, then the issues of exactly how and why that came
14 about would not be material. But you're saying that they have
15 to comply, and if they have to comply, then why are the issues
16 of why they haven't complied material?

17 MR. NATBONY: Yes. A few --

18 THE COURT: It's hard for me to see why that's --

19 MR. NATBONY: A few points, Your Honor. First of
20 all, as I said, the entire rationale of why they're not
21 complying is an issue in and of itself. I mean, you know,
22 first they talk about they just have a right to default. They
23 also say that they have, you know, a power to reject, you
24 know, and that is what they basically say in their papers.
25 But again, statutory obligations are not mere context that can

1 be rejected.

2 But there really is no evidence in this record that
3 the Commonwealth is failing to comply really because of some
4 abstract rights of default or breach. In fact, the record
5 evidence that is before Your Honor shows that the Commonwealth
6 is not relying on some amorphous right to default or breach,
7 but in fact, because of the moratorium laws and orders.

8 And I would refer you to Exhibit 55 to my
9 Declaration, which is a Commonwealth Treasury spreadsheet,
10 which details revenues that were withheld under the Moratorium
11 Act and related executive orders, and they list by credit,
12 whether it be the various excise taxes under those provisions
13 -- so if the right to breach is the Commonwealth's
14 justification, at minimum, there is a genuine issue of fact
15 that needs to be explored and resolved.

16 We need to know what the true purported justification
17 of the Commonwealth is, and who is going to tell us that, and
18 how it was determined, so that we can literally test it.

19 THE COURT: The Commonwealth is saying that if
20 there's a breach, whatever reason there is for the breach,
21 your clients still have their contract claim against HTA; HTA
22 has whatever claim it may have against the Commonwealth, if
23 that survives; maybe you have a claim under the nonimpairment
24 covenant against the Commonwealth; but none of those, as a
25 matter of law, is a claim that supports a requirement of

1 specific performance in the absence of ownership interest in
2 these funds.

3 And so if they are right on that view of the law, and
4 I recognize that's a big if and you are and will be arguing
5 the law, but if they're right on that view of the law, then
6 yes, it would be interesting to know why. And yes, it might
7 make them, you know, look worse in some way that may be
8 material down the line somewhere else, but why is that a
9 genuine issue of material fact in connection with this summary
10 judgment motion practice?

11 MR. NATBONY: Again, a few points, Your Honor.
12 First, to the extent that there is a lack of justification to
13 withhold, whatever the reason be, whether it be the breach,
14 whether it be the Moratorium Orders, whether it be the
15 budgets, whether it be, you know, some purported clawback
16 right that justifies retention, the bottom line here is that
17 if those justifications are without basis, then the money
18 needed to be transferred. And HTA would have had control, and
19 the amount of our secured claim would essentially rot.

20 So even under Your Honor's Lift Stay decision that
21 limited the security interest to those monies that would be in
22 the Fiscal Agent account, if there is no justification for
23 lawful control and lawful possession under any of these
24 theories, then the amount of our secured interest goes up
25 because the amount that would be in the fiscal accounts

1 necessarily as a matter of law would have had to have been
2 transferred to those accounts.

3 And, of course, Your Honor, I recognize that in
4 addition, we respectfully disagree with the overall property
5 interest reasoning set forth there. So if that were to
6 change, that would impact things here as well.

7 THE COURT: Thank you.

8 MR. NATBONY: So just as far as the extent the
9 Oversight Board claims that its Fiscal Plans or Budgets,
10 rather than the moratorium laws, are the cause of the failure,
11 again, there's no evidence of that in the record. If fiscal
12 plans or budgets did have the effect of impairing defendants'
13 bond in this manner, then in theory, the amount of our secured
14 claim would go up, and the fiscal plans and budgets would
15 likewise violate the Contract Clause, as Mr. Berezin will
16 address.

17 And I should also note that the Fiscal Plans and
18 Budgets are also void even under PROMESA, because before
19 developing or certifying a plan or budget, the Oversight Board
20 was required to conduct an analysis of mandatory factors
21 enumerated in Section 201 of PROMESA. And here, the record
22 evidence shows the Oversight Board did not perform that
23 analysis. In fact, the Board did not define essential public
24 services, which would have been necessary in order to
25 determine whether a fiscal plan ensures the funding of

1 essential public services as required under Section 201.

2 Now, plaintiff does rely on PROMESA Section 106(e) to
3 assert that defendants could not challenge a certification
4 determination of a fiscal plan or budget, but, however, a
5 certification determination as such term is used in Section
6 106(e) means a determination that the Fiscal Plan or Budget
7 satisfies the mandatory Section 201 factors.

8 Since the Board never performed the Section 201
9 analysis, there is no certification determination to challenge
10 and Section 106(e) doesn't apply. To the extent plaintiff
11 relies on a clawback theory under Article VI, Section Eight,
12 to justify its retention, material issues of fact do exist
13 concerning whether any clawback was justified. The
14 Commonwealth's alleged clawback is dependent on an analysis
15 under Article VI, Section Eight, that budget appropriations
16 would need to exceed available resources in every single year
17 that the clawback was purported, and that there would have had
18 to have been no resources available to the Commonwealth to pay
19 the public debt other than the excise taxes in any year where
20 budget appropriations exceeded available resources.

21 These too are factual issues that depend on
22 discovery, which defendants have not had access to yet. To
23 properly test plaintiff's contention, defendants will require
24 discovery into the Commonwealth's available resources, how
25 those resources were misspent in violation of Article VI,

1 Section Eight, and the uses of any revenues that were
2 retained.

3 Plaintiff asserts that the declaration by Congress
4 four years ago, that the fiscal emergency is tantamount to the
5 required analysis. Not so. The generalized declaration of a
6 fiscal emergency is not a substitute for the particularized
7 analysis of resources and expenditures required as a
8 prerequisite to clawback or retention based on a clawback
9 analysis. There has been no discovery in these cases as to
10 the existence, scope and findings of that required analysis,
11 and such evidence is essential in determining the validity of
12 the Commonwealth's actions here.

13 And, Your Honor, I do want to, at least with respect
14 to HTA, discuss for a minute Fund 278. Now, I know the Court
15 has already, in the context of the Lift Stay Motion, looked at
16 the existing documents relating to Fund 278; but there is no
17 dispute that Fund 278 exists and is tagged with specific HTA
18 subaccount identifiers, and that Fund 278 transaction approval
19 authority was specifically delegated to HTA.

20 And while I understand the Court initially discounted
21 such evidence, an essential question remains unanswered and
22 should be explored in discovery: Why was Fund 278 even
23 necessary? The Commonwealth says it was an accounting
24 mechanism. Well, an accounting mechanism to account for what?
25 And why was such an accounting needed?

1 When we attempted to seek the justifications of
2 defendant -- of the government's actions with respect to
3 various escrow issues, we were shut down at the 30(b)(6)
4 deposition. Defendant should have the opportunity to explore
5 these questions in the context of this adversary proceeding
6 and as part of their yet unasserted defenses and
7 counterclaims.

8 Interpretation of the Excise Tax Statutes and whether
9 and to what extent funds have been made available for HTA are,
10 at minimum, mixed questions of law and fact that should not be
11 decided at this early stage on summary judgment. And I do
12 know that, given Your Honor's Lift Stay Motion decision, there
13 were a number of instances in which Your Honor literally
14 interpreted a number of the statutory provisions. For
15 instance, the interrelationship between resolution Sections
16 401 and 601; the meaning and the interpretation of the words
17 "other obligation." And we do take the position that while
18 the Court made determinations about the existence of colorable
19 claims then, the interpretation of these provisions are at
20 least mixed questions of law and fact now which should be
21 decided only after a full record and not at this early stage
22 of summary judgment.

23 I think it is important to spend a few minutes
24 addressing plaintiff's total mischaracterization of Rule 56(d)
25 and its procedural requirements. Defendants' reliance on Rule

1 56(d) is neither untimely nor procedurally improper. Rule
2 56(d) is generally the part of a basis for opposing a summary
3 judgment motion. It's expected, if appropriate, to be part of
4 the file. It's not a separate motion. It's not even a motion
5 at all. It's an appropriate basis for opposing the type of
6 motion that is here, a summary judgment motion. Just because
7 there may be identified material facts in issue does not mean
8 that there cannot also be a valid basis for denying the Motion
9 and ordering that discovery proceed.

10 Defendants claim that we were not diligent. Well,
11 that is just not true. The Board pressed for this schedule
12 for summary judgment motions, preceding answers in discovery,
13 fought discovery, and then accused us of sitting on our hands
14 when, in fact, the timing was actually set by this Court.

15 As was contemplated by this Court, the Motions for
16 Summary Judgment were to be limited to those issues that did
17 not raise material, disputed issues of fact. And as the Court
18 recognized on the March 4th transcript at pages 220 to 221,
19 and as all the parties understood, defendants would have the
20 right to use 56(d) as a safety valve to oppose summary
21 judgment to the extent the government's motion was overbroad.

22 That is the case here, and defendants have done
23 nothing more than follow the procedures anticipated by the
24 Court by submitting the required declarations under the rule
25 and arguing that discovery is needed. Those declarations set

1 forth in detail and as required the discovery needed and the
2 disputed facts such discovery related to.

3 Plaintiff's assertion that defendants did not timely
4 request discovery ignores that, over defendants' objection,
5 these cases, including discovery proceedings, were under a
6 Stay Order. And also, contrary to plaintiff's assertion,
7 defendants' Rule 56(d) argument is not precluded merely
8 because defendants have concurrently attempted to oppose the
9 Summary Judgment Motion as best that they can without
10 discovery.

11 Defendants' papers in numerous places recount the
12 need for discovery, and the case law is clear that
13 simultaneous alternative arguments of this type are not
14 prohibited. Indeed, what occurred here is quite common and
15 distinctly distinguishable from the few off-point cases relied
16 upon by plaintiff. In those cases, either the party opposing
17 summary judgment either failed to follow Rule 56(d)
18 requirements, or used Rule 56(d) as a second bite at the apple
19 after the Court had already ruled on summary judgment. That
20 is not the case here.

21 Plaintiff argues the various 56(d) Declarations are
22 speculative and do not identify the specific facts defendants
23 expect to obtain. However, as First Circuit case law
24 establishes, the purpose of Rule 56(d) is to reveal unknown
25 facts. Rule 56(d) does not require or anticipate that a party

1 seeking discovery have a crystal ball to be able to identify
2 the facts that discovery will establish. Indeed, the
3 existence of discovery, by its very nature, is at least
4 somewhat speculative. All that is required is that a
5 plausible basis be shown that material facts may conceivably
6 raise a triable issue of fact.

7 To -- plaintiff's cases that they rely upon have
8 facts in which declarations were submitted that -- either had
9 gauzy generalities alleged, merely identified witness lists,
10 were wholly conclusory statements, or mainly issues of law.
11 The declarations set forth in this case, including the Servais
12 Declaration with respect to HTA, and the Hughes Declarations
13 as well, set forth with specificity the discovery sought, and
14 met, under the PHC standard, the "necessarily low" standard of
15 establishing the materiality of the requested discovery. And
16 indeed, just to give the Court a number of examples, we've
17 talked about the ambiguity of statutes, and the interpretation
18 of statutes, and how the government parties interpreted the
19 statutes and -- by their actions, more recent Fund 278
20 documents accounting for the Sinking Fund, documents relating
21 to the HTA subaccount information, documents relating to the
22 appropriations process, documents relating to any further
23 bond-related agreements or documents that we were not
24 signatories to, documents relating to essential services
25 determinations or clawback uses of funds.

1 I would refer Your Honor to paragraphs 47 to 80 of
2 the Servais Declaration, where we list out all the issues and
3 discovery sought. The limited discovery that we obtained in
4 the Lift Stay proceedings is no substitute in substance or
5 scope to the full discovery rights within these adversary
6 proceedings, where final claim determinations should be based
7 on a full record. It should -- is not unimportant to indicate
8 that plaintiff is seeking a final adjudication here of
9 defendants' rights.

10 And the discovery in the Lift Stay actions was
11 limited to just a few paragraphs in the government's briefs,
12 and further limited by Judge Dein's ruling on the Motion to
13 Compel. And as I said before, during the 30(b)(6) deposition,
14 when we asked about underlying rationales behind certain
15 actions by the government, the government parties objected and
16 directed their witness not to answer.

17 And significantly, the scope of discovery for the
18 Lift Stay Motions was framed and briefed eight weeks before
19 the FOMB even filed its Summary Judgment Motion, so whatever
20 facts and additional facts have been raised by the Motions
21 would not have been addressed then.

22 So a number of points that I would like to address
23 that Mr. Bienenstock pointed to. Mr. Bienenstock, in relation
24 to the 544 claim, made a statement to Your Honor that what he
25 was really talking about was Section 544(b), not 544(a).

1 Well, if that's the case, that's news to us, because the
2 Complaints and adversary proceedings there do not state causes
3 of action under 544(b). They only state causes of action
4 under 544(a).

5 And, as we set forth in our brief, the Section 544
6 avoidance claims are time-barred. I realize Mr. Bienenstock
7 did not address that, but this was all set forth in detail in
8 our papers as to why they are time-barred.

9 Mr. Bienenstock does talk about the hypothetical lien
10 issue, but indeed, under 544, avoidance is not available
11 because no hypothetical judicial lien creditor could exist as
12 to HTA or the Commonwealth under Commonwealth law as is
13 required under Section 544's plain language. The Commonwealth
14 is protected by sovereign immunity, despite Mr. Bienenstock's
15 allegations, as a matter of policy, prevented from being the
16 subject of an attachment of a judicial lien.

17 We've cited to the Court the *Diaz* case, the *Libortex*
18 case, and Puerto Rico Act 66 of 2014 that basically restrict
19 relief we attest not to attachment of judicial lien, but
20 repayment plans. And the reasoning behind these prohibitions
21 is to avoid the interference with the execution of public
22 function. So the Commonwealth is not a Section 544 defendant,
23 and, therefore, Mr. Bienenstock's argument that Section 106
24 applies is just wrong, because by its terms, Section 106 only
25 applies for claims that are against the government.

1 Now, Mr. Bienenstock also talked about PROMESA
2 Section 301(c)(7). 301(c)(7) does not make the Board a
3 trustee in bankruptcy. It only effectuates a substitution of
4 the term "Oversight Board" for the term "trustee." It does
5 not provide the Oversight Board as a trustee. And indeed, if
6 Your Honor looks at the HTA 926 Motion in case 17-3283, it's
7 at ECF 13929, at paragraph 44, note 19, the Board concedes
8 that it is not a trustee.

9 Now, Mr. Bienenstock also talked about, with respect
10 to the perfection issue, that money and -- the medium of
11 exchange argument that Mr. Bienenstock talked about. Well,
12 Mr. Bienenstock misunderstands our argument that any security
13 interest in deposit accounts would be perfected as a security
14 interest in identifiable proceeds.

15 Well, first of all, I think the Board
16 mischaracterizes the nature of our collateral in its deposit
17 accounts, first of all, because collateral is a deposit
18 account only when it fits the narrow category, when security
19 documents specifically grant a security interest in an account
20 maintained with a debt. That's not the case here.

21 Resolution Section 601 grants an interest in
22 revenues. Resolution Section 601 grants a security interest
23 in money, and the Sinking Fund, which is a special fund, not a
24 deposit account at a bank. So at minimum, there's an issue of
25 fact as to the existence of any deposit account and any

1 deposit or control agreement. But, of course, even when you
2 get to the issue of money and the protection of money, the
3 fact is the UCC definition of money includes any medium of
4 exchange.

5 We are not saying that deposit accounts are a medium
6 of exchange. We're saying that money is a medium of exchange,
7 which is how the UCC defines money. To the extent defendants
8 have a perfected security interest in money, and that money is
9 somehow later transformed into a deposit account, and the
10 deposit account is proceeds of the money, and the perfected
11 security interest would attach to the proceeds -- and, of
12 course, that is under 19 L.P.R.A. 2265(a)(2)(C).

13 But, in any event, the Board's protection argument is
14 irrelevant, because the Board's Complaint never even
15 challenges any security interest in revenues and money. The
16 entire Complaint is premised on the incorrect notion that
17 defendants' security interest is in deposit accounts as
18 original collateral, which it is not. So any issues related
19 to defendants' security interest in revenues and money
20 therefore fall outside of the scope of the Complaint, and any
21 arguments by the Board on these issues fail as a pleading
22 matter.

23 Just looking here to see what else I have, if
24 anything.

25 So, Your Honor, where are we, you know, right now?

1 We're in a position -- what's different now? So we're in a
2 completely different procedural posture than we were when we
3 were before you on the Lift Stay Motion. There's a different
4 burden. Plaintiff has the burden here. There's a different
5 result. This is a summary judgment proceeding that could have
6 the impact of addressing with finality the Monoline
7 Defendants' rights.

8 The need for a full record and final resolution of
9 facts is extremely important here. There are broader legal
10 issues that are before the Court here than there were on the
11 limited Lift Stay Motion. And indeed, our defenses to
12 counterclaims have not even been asserted yet. From our
13 perspective, it's the plaintiff, the Board, that chose to
14 proceed in this manner and in this largely premature manner.
15 And it's our position, Your Honor, that, as such, the
16 consequences of that should be borne to the plaintiffs in
17 terms of not having the Summary Judgment Motion granted.

18 I think that there's only one more point that I
19 wanted to make before I pass on to Ms. Miller and Mr. Berezin.
20 As Mr. Bienenstock mentioned, at paragraph three of our
21 Sur-Reply, we cited *Kentucky Employees Retirement System*
22 *versus Seven Counties* to establish that statutory obligations
23 are not mere contracts and cannot be rejected. Well, contrary
24 to Mr. Bienenstock, this proposition in *Kentucky* was not based
25 on 28 U.S.C. § 959(b). At page three, the Sixth Circuit

1 | stated categorically, and without reference to Section 959(b)
2 | that, "if the Kentucky Supreme Court found the relationship to
3 | be statutory in nature, Seven Counties would be unable to
4 | reject its obligation to participate as an executory contract,
5 | which would resolve the core claim raised" in the adversary
6 | proceeding.

7 | The Sixth Circuit went on to say that the issue of
8 | whether that obligation must be faithfully maintained during
9 | the pendency of proceeding under 28 U.S.C. § 959(b) would
10 | remain as a separate issue. So that should dispose of that.

11 | Unless Your Honor has further questions for me, I'm
12 | going to defer the remainder of my time to Ms. Miller and
13 | Mr. Berezin.

14 | THE COURT: Thank you very much, Mr. Natbony. I
15 | think you have five minutes left of your time.

16 | MR. NATBONY: Thank you, Your Honor.

17 | MS. MILLER: Good morning, Your Honor.

18 | THE COURT: Ms. Miller, good morning.

19 | MS. MILLER: Good morning, Your Honor. Atara Miller
20 | from Milbank on behalf of Ambac.

21 | As is becoming routine, I'm going to begin my
22 | argument this morning by addressing the preemption arguments
23 | raised by the Board. And for purposes of this discussion,
24 | I'll address HTA, PRIFA, and CCDA together. Later, when it's
25 | relevant, I'll go through the specifics of each

1 instrumentality, but for preemption, we can think of them all
2 together.

3 And as Mr. Natbony noted, the procedural posture here
4 is quite different from the last time we discussed this issue.
5 And as Your Honor noted in your questioning of Mr. Bienenstock
6 this morning, the Oversight Board somewhat unconventionally
7 asserts in its Adversary Complaints separate causes of action
8 seeking disallowance of defendants' claim based on different
9 legal theories, rather than seeking disallowance, and then
10 supporting a claim for disallowance with various legal
11 arguments.

12 And in particular, as relevant to the preemption
13 arguments, the Oversight Board asserts counts seeking
14 judgment, disallowing defendants' claim based on unlawful
15 retention of the revenues because the enabling statutes were
16 purportedly, quote, preempted by PROMESA. So this odd
17 pleading approach actually simplifies the preemption analysis,
18 as I think some of Your Honor's questions were teasing out
19 earlier today.

20 So despite moving for summary judgment on those
21 counts seeking to disallow defendants' claim based on the
22 preemption theory, the Oversight Board has acknowledged, and I
23 think even Mr. Bienenstock acknowledged this morning, that
24 preemption is not itself a basis for disallowing defendants'
25 claim. As an example, in the CCDA Reply, at page 55, the

1 Oversight Board states that "PROMESA preempts any territorial
2 law appropriating funds not provided for in an Oversight Board
3 certified budget. Nothing more. The legal effect of this
4 action is not to, "strip any claims or rights defendants may
5 have." Whatever claims or rights they have remain and will
6 receive the treatment provided in an eventual plan of
7 adjustment."

8 Accordingly, the Oversight Board's Motion for Summary
9 Judgment on Counts 5, 26, 47, and 66 of the CCDA Complaint;
10 11, 37, 63, and 87 of the PRIFA Complaint; and 5, 28, 51, 74,
11 97, 119, and 141 of the HTA Complaint should be denied.

12 That raises the question, why, if the Oversight Board
13 recognizes this necessary limitation of any preemption
14 argument, does it spend dozens of pages and did
15 Mr. Bienenstock lead with it in his argument this morning
16 trying to persuade this Court to endorse it. So if one steps
17 back and considers the big picture, the answer is actually
18 pretty evident.

19 Preemption is the tool that the Oversight Board is
20 looking to use to solidify its absolute, unfettered and
21 unreviewable discretion in controlling creditor outcome. In
22 an ordinary municipal restructuring, the debtor's actions and
23 the proposed treatment of creditors are constrained by Chapter
24 Nine and evaluated by the Court in a confirmation process; and
25 that is exactly what Title III of PROMESA contemplates.

1 The Oversight Board, however, through preemption, is
2 seeking to eliminate creditors' rights and the obligations of
3 the Commonwealth and its instrumentalities outside of and
4 before the Title III process. Through Certified Fiscal Plans
5 and Budgets, the Oversight Board theorizes it can choose the
6 winners and losers and lock in the state of those creditors,
7 regardless of whether there is even a pending Title III case.

8 The Title III process, as the Oversight Board would
9 have it, becomes nothing more than an evaluation of whether
10 the Plan conforms to the creditors' rights that the Oversight
11 Board has already unilaterally imposed through the budgets.
12 And I think Mr. Bienenstock said something like, well, it
13 preempts for as long as we decide to have it preempt. We
14 could do 20 years, 30 years, 40 years. Whatever we put into a
15 fiscal plan or budget is what would define it.

16 In a preemption world, Title II does the heavy
17 lifting on the restructuring, and Title III just comes in to
18 do the cleanup. For purposes of the pending Summary Judgment
19 Motion, preemption is still important, however, because it's
20 the purported legal theory for the proposition that either the
21 Commonwealth did not violate any Commonwealth law, because the
22 revenue bond statutes were preempted, or that any breach of an
23 existing obligation was caused by federal, not Commonwealth
24 law.

25 These premises are foundational to the Oversight

1 Board's objection to defendants' Section 407 and Contract
2 Clause claims. So I am going to -- even though they're
3 preemption -- their Motion for Judgment on their preemption
4 claims can easily be denied, I'm still going to have to engage
5 with it.

6 The Oversight Board again advances, as we heard
7 repeatedly this morning in the rattling off of sections,
8 numerous theories of preemption, framing focused first on
9 express preemption based on Section Four, arising from Section
10 202, 207, Title III, or then, alternatively, implied
11 preemption. And I'll take them each.

12 First, the Oversight Board contends that by granting
13 fiscal planning and budgeting powers in Sections 201 and 202
14 to the Oversight Board, Congress preempted all Commonwealth
15 laws that obligate the distribution of money not in the
16 budget. And frankly, on this point, I'm almost never sure
17 when I stand up to speak exactly what the Oversight Board's
18 position is going to be.

19 And there are two oscillating factors that I want to
20 highlight, because I think the inability to lock in on one
21 demonstrates how neither can be a valid reasoning. And one is
22 whether it's the Fiscal Plan or the Budget that preempt. And
23 I thought that the Oversight Board had walked away from the
24 notion that the Fiscal Plans preempt by saying, I think
25 expressly, that they recognize that the Fiscal Plans have no

1 | legal weight and can't preempt anything. But I heard
2 | Mr. Bienenstock say this morning that the Fiscal Plans and the
3 | Budgets preempt, and they need the Fiscal Plans under
4 | Mr. Bienenstock's theory, in response to your question of the
5 | scope of preemption, because Budgets are annual laws. And so
6 | if they want to have a preemption theory go beyond and cover
7 | 20, 30, or 40 years, it has to come through the Fiscal Plan.

8 | So that's one oscillating point. And the other one
9 | is whether the budgets actually preempt or not, and what
10 | they're preempting.

11 | So I'm going to assume for purposes now, because I
12 | think where Mr. Bienenstock last lay the marker is that the
13 | budgets are preempting, so -- but because Commonwealth laws
14 | can't preempt anything, as we heard Mr. Bienenstock explain
15 | this morning, the Oversight Board argues that the Commonwealth
16 | budgets are actually federal laws. And that's kind of a head
17 | scratcher in itself. And as Your Honor noted, it's actually
18 | contradicted by Section 202 itself, which provides that, in
19 | the event that even when the Oversight Board develops the
20 | budget itself, it has to be, quote, "deemed approved by the
21 | Governor and the Legislature." And that's because you have to
22 | have a Commonwealth Act, a Commonwealth Act of law, that
23 | dictates to the Commonwealth what expenditures it's going to
24 | make in that particular year.

25 | The Oversight Board, though, actually recognized as

1 much, and affirmatively argued, for example, at page seven of
2 its CCDA Motion, that the legislature has repealed the revenue
3 bond statutes because, PROMESA § 202(e)(3)(A) expressly
4 provides a Commonwealth budget developed and certified by the
5 Oversight Board is 'deemed to be approved by the Governor and
6 the Legislature.'

7 And that was in response to the argument that says
8 that, actually, the excise taxes have never been repealed. So
9 where they want to say that they were repealed, it was done by
10 this legislative act, the deemed approval of the budget.

11 This conclusion is all --

12 THE COURT: Were you -- I'm sorry. Go on.

13 MS. MILLER: No. I was just going to say that this
14 conclusion is also necessitated, although it wasn't raised
15 this morning, by the Supreme Court's decision in *Aurelius*,
16 which recognizes that the Oversight Board, in its action, is
17 exercising territorial, not federal powers.

18 THE COURT: Yes. I understand your argument.

19 And so are you saying with respect to the repeal
20 effect, that to the extent there is implicit repeal, it could
21 only be by the approval of the budget, which is necessarily
22 cabined annually by this argument by the Oversight Board, et
23 al?

24 MS. MILLER: So I'm actually going to get to the
25 repeal argument a little later, but the basics -- my basic

1 take on it is that a budget can't repeal anything. I mean,
2 Mr. Bienenstock himself said that the only thing that a budget
3 does is authorize disbursements within a particular year. It
4 doesn't modify an obligation.

5 And so the repealing of the statute would actually
6 require a modification of the obligation, which nobody
7 suggests that a budget actually does. The budgets can't
8 repeal laws. If you want to repeal the obligation, you have
9 to go out and actually change the excise tax law.

10 One interesting note here is that the Oversight
11 Board, in all its discussions, doesn't actually address what
12 would happen if the budget were a Governor or legislature
13 presented budget that was simply certified compliant by the
14 Oversight Board. And there it would clearly have been
15 expressly and directly passed by the legislature, and -- by
16 the Puerto Rico legislature. And it seems like the Oversight
17 Board's argument is that its certification would magically
18 convert a Commonwealth statute into a federal law with
19 preemptive power.

20 So, I mean, that's just one way of thinking about
21 this argument that makes it clear that it just can't be right.
22 So as an alternative, the Oversight Board argues that the
23 budgets themselves don't preempt. I'm not relying on the
24 budget, but I'm only relying on the fact that PROMESA created
25 a conflict upon enactment, that by granting the Oversight

1 Board authority over fiscal plans and budgets, the Oversight
2 Board argues, Congress immediately preempted all Commonwealth
3 laws providing for the disbursement of funds, wiping clean the
4 slate for the Board to start its work and decide how money
5 should be allocated.

6 So under this theory, Congress left the Commonwealth
7 without any authority to make payments or transfers for over a
8 year after PROMESA was enacted until the Oversight Board was
9 appointed and a Commonwealth budget certified. That's plainly
10 not what happened. And so the suggestion that all of these
11 laws were actually preempted and couldn't be complied with
12 regardless of, you know, the Certified Budget, I think is sort
13 of logically impossible. It's also inconsistent with the
14 limited conflict preemption articulated in Section Four.

15 It's hard to believe that through this provision
16 alone, Congress preempted all of the laws obligating the
17 payment or transfer of money. And numerous sections of
18 PROMESA show that this isn't what Congress intended.

19 I know we discussed them last time. We have them in
20 our Brief. I'm not going to go through them again. But
21 there's no question that, you know, there is at least in
22 Section 303, particular preemption, which specifically
23 identifies particular Commonwealth statutes and executive
24 orders that are being -- that were preempted by Congress. And
25 the idea that they then, you know, silently preempted every

1 statute that directs money to anybody is just somewhat
2 inconceivable.

3 So at a high level, keeping in mind the balance that
4 Congress was trying to strike between providing Puerto Rico
5 with some relief, but also was protecting creditors, and
6 thinking about the stated goals of PROMESA to allow Puerto
7 Rico to regain access to the capital market, as well as the
8 really complex Title III and Title VI procedures that they
9 developed and built into the statute, it's hard to find
10 credible this idea that they really preempted all of these
11 statutes, including the Revenue Bond Statute, stripping the
12 revenue bondholders of the value of their collateral and
13 leaving them with empty obligations.

14 So Mr. Bienenstock didn't discuss it this morning,
15 but the Oversight Board relies on the First Circuit decisions
16 in *Vazquez-Garced*. That decision is inapposite. It doesn't
17 address at all, and I don't think there was discussion of it
18 this morning, but Your Honor I believe at the last hearing
19 actually recognized and asked a question related to this. But
20 that -- nothing in the First Circuit argument actually went to
21 the effect, if any, the Oversight Board's control over budgets
22 would have over -- on pre-existing obligations. It dealt
23 exclusively with the ability of the Governor in that instance
24 to reallocate or reprogram monies that had not been spent in a
25 prior fiscal year, a process that was clearly set out in

1 PROMESA, including in Section 204, in a manner that was
2 inconsistent.

3 This Section Four, conflicts preemption, clearly
4 applied there, but the same is not true here. On this motion,
5 the Oversight Board identifies Section 207 as an additional
6 force of preemption. As Your Honor noted this morning,
7 Section 207 says nothing about repayment of existing debt
8 obligations.

9 Mr. Bienenstock suggested that the inclusion of
10 redemption does cover that, but redemption does not mean
11 ordinary course scheduled debt payments. Redemption is a term
12 commonly used. It means the payments of the estate -- value
13 and any remaining interest at maturity on a bond, not the
14 payment of regularly scheduled debt service.

15 So, you know, if anything, you could look at the fact
16 that Section 207 basically covered every aspect of debt
17 payment reissuance, renegotiation, and required Oversight
18 Board consent; but expressly carved out of that, the ability
19 to repay -- sorry, the ability to continue making scheduled
20 debt service, leaving that within the Commonwealth power and
21 ability.

22 So next, the Oversight Board argues that movant's
23 claims are preempted by Title III of PROMESA, which only
24 recognizes an administrative priority. And I think Your
25 Honor's probably tired of hearing me say this, but I just want

1 to reiterate that it's Ambac's position, and I know FGIC joins
2 in this position as well, that this theory applies equally to
3 the GO bondholders. But that the Oversight Board is resisting
4 having that question litigated in that context so that it can
5 use a pretextual settlement thereof for 20 times what they're
6 offering the revenue bondholders as the anchor of a
7 GO-centered Plan of Adjustment.

8 But as against the revenue bonds, the Board's
9 argument fails on the merit, and it's irrelevant, frankly, for
10 purposes of this motion. Title III addresses only the
11 treatment of claims in a plan of adjustment. It does not
12 abstractly preempt rights or reprioritize claims. There's no
13 plan here, and at an appropriate time, we'll talk about it.

14 The Oversight Board suggests that Title III has to
15 preempt, because it would otherwise require payments in full
16 of the revenue bond debt. But whether or not the debt needs
17 to be paid in full will be determined by the provisions of
18 Title III in a plan of adjustment, as is the case in all
19 municipal bankruptcy proceedings. Title III is not a source
20 of preemptive elimination of rights before confirmation.

21 In addition to express preemption, the Oversight
22 Board argues that the revenue bond statutes are -- impliedly
23 preempt, as contrary to the overall goal of PROMESA. This
24 argument also just falls. Implied preemption is narrow and
25 generally disfavored. It applies only where two acts cannot

1 be reconciled or consistently stand together.

2 The Oversight Board itself recognizes that the
3 question of whether elimination of the Commonwealth's
4 obligation under the Revenue Bond Statute is necessary for the
5 Commonwealth to achieve fiscal responsibility and access to
6 the capital markets, two of the express purposes of PROMESA,
7 is subject to, quote, opposing views. This alone precludes
8 summary judgment. You can't have opposing views on factual
9 questions and still move for summary judgment.

10 This also addresses the argument Mr. Bienenstock
11 raised this morning to -- Section 108(a)(2) would preempt,
12 because again, 108(a)(2) is a reference to the purpose, and as
13 Mr. Bienenstock says, there are conflicting views and ideas
14 about what the purpose of the statute is.

15 The Oversight Board's conclusory assertion that the
16 Commonwealth could not reorganize its debt without revenue
17 bond statutes being preempted, based exclusively on the
18 declaration of Adam Chepenik that it would result in 20
19 percent of the annual spent being outside of the budgeting
20 authority of the Oversight Board, is not enough. This is a
21 factual question on which defendants have obtained no
22 discovery.

23 The application of implied preemption is also
24 contrary to the expressly defined contours of PROMESA
25 preemption defined by Congress and included in Section Four.

1 In addition to express and implied preemption, the Oversight
2 Board refers again to the non-entrenchment principle. And I
3 love the image of me, myself being an alchemist, doing magic.
4 I shared it with my children. They got a great laugh out of
5 it. But we are not the ones who are introducing or who have
6 ever introduced the non-entrenchment principle.

7 I do think that at least the Oversight Board has now
8 recognized that it is fundamentally distinct from the idea of
9 preemption, but they do advance it as a separate and
10 independent basis to simply avoid paying -- meeting their
11 statutory obligations. And Mr. Natbony addressed some of it,
12 and I just want to add that, you know, as previously
13 discussed, you know, Mr. Bienenstock talks about 200 years of
14 bankruptcy law preempting. No one's looking to unwind or undo
15 200 years of jurisprudence. What we're trying to do is have
16 bankruptcy law apply, as bankruptcy law would apply, and not
17 live in this world where other theories of alternate
18 preemption can avoid rights and have you go into the
19 bankruptcy process naked. That's not what anybody in
20 bankruptcy ever contemplated, but that's what the Oversight
21 Board would have done here.

22 But the Oversight Board, in suggesting that you can
23 simply default without consequence, is avoiding, you know, 150
24 years of jurisprudence that they don't address, starting with
25 *Von Hoffman versus City of Quincy*, which you know I like, and

1 the progeny from that. And there, the Court held that it's
2 clear that where a state has authorized a municipal
3 corporation to contract and to exercise the power of local
4 taxation to the extent necessary to meet its engagements, the
5 power thus given cannot be withdrawn until the contract is
6 satisfied.

7 The state and the corporation in such cases are
8 equally bound. The power given becomes a trust, which the
9 donor cannot annul, and which the donee is bound to execute.

10 And Your Honor asked Mr. Natbony earlier whether, you
11 know, any beneficiary of a statutory obligation is entitled to
12 specific performance under all circumstances. And while that
13 may be an interesting theoretical question, it has no bearing
14 on the facts before us here. Right. What we are dealing with
15 is a fact pattern that's directly analogous to the facts in
16 *Von Hoffman*. And the Supreme Court has already answered the
17 question that you are entitled to mandamus for specific
18 performance.

19 Now, at argument, Your Honor asks about -- argument
20 on the Lift Stay Motions, Your Honor asked about the interplay
21 between the *Von Hoffman* line of cases and the more modern
22 Contract Clause analysis. Notably, as I think you identified
23 this morning, the Oversight Board in its Motion does not even
24 suggest that this Court should apply a modern Contract Clause
25 substantial impairment analysis. It introduces no evidence,

1 | probably because it recognizes that it's a clearly factual
2 | issue; actually, didn't move for summary judgment on that
3 | portion of -- or those portions of the various Contract Clause
4 | claims. I'm not even sure how to characterize their counts.

5 | So the counts seeking summary judgment -- seeking
6 | disallowance of claims based on Contract Clause, based on the
7 | theory that the impairment was reasonable and necessary, are
8 | not part of their Motion. Instead, it just simply reiterates
9 | and rests on the same non-entrenchment argument.

10 | The only additional argument that the Oversight Board
11 | makes is in response to defendants' argument that --

12 | THE COURT: I'm sorry.

13 | MS. MILLER: Go ahead.

14 | THE COURT: I just want to be clear. You said they
15 | just rest on the same non-entrenchment argument. Do you mean
16 | to say that their non-impairment argument always circles back
17 | to and boils down to non-entrenchment, or did you mean to say
18 | non-impairment?

19 | MS. MILLER: No. I meant to say non-entrenchment.
20 | Meaning that the -- well, I guess they say that there is no
21 | impairment, and for that they don't suggest that it was
22 | reasonable and necessary impairment. They just say blanket
23 | non-entrenchment means that there's never an impairment. And
24 | they go on and on about how it was enacted by, you know, the
25 | 1988 legislature, and now we are in the 2020 legislature. So

1 they're relying on non-entrenchment as a basis for
2 nonimpairment --

3 THE COURT: Thank you.

4 MS. MILLER: -- rather than suggesting that it's not
5 reasonable and necessary.

6 THE COURT: Yes.

7 MS. MILLER: Or that it was reasonable and
8 necessary.

9 THE COURT: Thank you.

10 MS. MILLER: The only additional argument that they
11 make in response to the argument that non-entrenchment was
12 purely hypothetical because the laws weren't validly amended
13 is, as I mentioned already, that they were abrogated by the
14 budget, which only reinforces the Contract Clause claim here.

15 So the Revenue Bond Statutes have thus not been
16 preempted by PROMESA, and any violations thereof bring with
17 them the attendant consequences. And any Title III
18 restructuring must occur against the backdrop of those
19 existing rights and obligations.

20 So unless Your Honor has any other questions on
21 preemption, I'm going to turn to Section 407.

22 THE COURT: That's fine. Please do.

23 MS. MILLER: Okay. Thank you.

24 Section 407 was included in PROMESA as one of a suite
25 of provisions expressly intended by Congress to protect

1 revenue bondholders, and in particular, to address the
2 Commonwealth self-help tactic of taking or redirecting monies
3 pledged to or intended to be used to pay revenue bondholders.

4 As the Senate Republican Policy Committee Legislative
5 Notice makes plain, Section 407 was a direct response to the
6 Commonwealth's diversion of HTA and other revenue bond
7 revenues, which diversion Congress believed it was putting a
8 stop to through the preemption of the relevant executive
9 orders and moratorium acts in Section 303, and a concern that
10 Puerto Rico may attempt to redirect funds again.

11 Congress, in an admittedly less than perfectly
12 crafted provision, created two causes of action: One, to
13 prevent the transfer of instrumentality property subject to
14 creditor's lien or security interest, and the second, to
15 prevent the diversion of money that is statutorily required to
16 be transferred to an instrumentality for the payment of its
17 own debt.

18 In discussing Section 407, the Oversight Board makes
19 two key errors, in addition to just their error in
20 application. First, it conflates the two prongs of Section
21 407, contending that both require the transfer or diverted
22 money to be, quote, property of the instrumentality. And
23 second, it argues that 407 gives rise to an unsecured claim,
24 which although it doesn't say this expressly, it plainly
25 believes it can be impaired under a plan and be paid in what

1 Your Honor has previously described as teeny, tiny, little
2 bankruptcy dollars.

3 The second issue is not properly before the Court on
4 this Motion. The Oversight Board's Motion seeks summary
5 judgment on the specific counts in its Complaint seeking to
6 disallow the 407 claim. The Oversight Board's argument that
7 the Court should nonetheless reach this issue is based on
8 their boilerplate prayer for relief in the Complaint, quote,
9 for such other relief as the Court may deem appropriate. Our
10 view is that that's simply an insufficient basis for the Court
11 to rule on the nature and classification of any resulting 407
12 claim.

13 In any event, the Oversight Board's legal premise
14 regarding the nature of the claim is defeated by Section 407
15 itself, which provides that, "the transferee shall be liable
16 for the value of such property." When the property at issue
17 is money, as it is here, there's no debate about the value of
18 that property. Creditors pursuing Section 407 claims,
19 therefore, do not obtain unsecured claims subject to
20 impairment. They receive the right to receive the value of
21 the improperly transferred or diverted funds.

22 Section 407 creates a bespoke fraudulent
23 transfer-like cause of action enforceable directly by
24 creditors, which returns value. Section 407 provides some
25 breathing room to the Oversight Board and the Commonwealth by

1 precluding creditors from enforcing Section 407 while a Stay
2 is in effect, but it requires that any transferred or diverted
3 monies be returned to the instrumentalities before the
4 expiration or lifting of the Stay.

5 Stated differently, Section 407 precludes
6 confirmation of any plan premised on the use of monies that
7 belong to an instrumentality or that would deprive an
8 instrumentality of money statutorily allocated to it for
9 payment.

10 The Oversight Board points to Section 201(b)(1)(M) to
11 support its position that an interinstrumentality transfer
12 could be approved in a plan of adjustment or qualifying
13 modification. The Oversight Board ignores, however, that
14 Section 407 includes no such limitation. Congress could have
15 included a parallel carve-out from Section 407, but did not.
16 Section 407 is, therefore, better understood as the limitation
17 on interinstrumentality transfers that can be included in a
18 plan.

19 Turning now to the two prongs of Section 407. The
20 first prong of Section 407 requires: One, a transfer of
21 property of an instrumentality; two, that the transfer is in
22 violation of applicable law; and three, that the property is
23 subject to a valid pledged security interest or lien on such
24 property, or would be subject to such a pledged security
25 interest or lien absent a violation of applicable law.

1 The Oversight Board relies entirely on its preemption
2 clawback and non-entrenchment arguments to support its
3 contention that the transfer does not violate applicable law.
4 I've already addressed preemption and non-entrenchment. And
5 as Your Honor has already recognized, clawback is an
6 inherently fact-specific inquiry, which on its own should
7 preclude summary judgment.

8 Whether the property is subject to a valid, pledged
9 security interest or lien is also the subject of much debate,
10 as Your Honor knows. We previously argued our position to the
11 Court in connection with the Lift Stay Motion, and they are
12 set out in detail in our briefs, understanding and respecting
13 Your Honor's prior rulings, with which I think you know we
14 respectfully disagree. I'm not going to go over those
15 arguments again here.

16 I'm going to note that -- our position that the first
17 prong of Section 407 does not require an attached, perfected
18 security interest, but rather applies in instances as would be
19 the case here under Your Honor's Lift Stay decisions, at least
20 with respect to HTA and PRIFA, where creditor has a valid
21 lien, but that lien has not yet attached to the property.

22 The Committee Notes on Section 407 directly support
23 this position. In the Opposition, the Oversight Board, as
24 Mr. Bienenstock cited this morning, in a statement by -- on
25 the House Floor by Representative Grijalva, expressing his

1 opinion on the Committee Note. That Representative Grijalva
2 felt the need to make the statement on the floor makes plain
3 that the text lends itself to the interpretation presented in
4 the Committee Notes and advanced by defendant. That Section
5 407 extends to property subject to a lien, whether presently
6 or in the future, if -- flowed as required.

7 Representative Grijalva's speculation about what he
8 believes was the intent of Congress is no more binding or
9 persuasive than the Committee Notes. And, in fact, Congress
10 took no action in response to Representative Grijalva's
11 comments. The Notes were allowed to stand, plainly evidence a
12 majority disagreement with his statement.

13 The remaining dispute on the first prong rests on
14 whether the transfers were property of an instrumentality.
15 The Oversight Board contends, and you heard Mr. Bienenstock
16 say it again this morning, that the Court already decided this
17 issue. But whether the money is property of the
18 instrumentality was not presented in the Lift Stay Motions at
19 all. The only question that the Court considered was whether
20 the Commonwealth had an interest sufficient to have the Stay
21 applied.

22 The question of whether the instrumentality has a
23 property interest must be evaluated under state law, which
24 creates and defines property. In HTA -- and here I'm going to
25 walk through each instrumentality separately just because the

1 statutes are obviously different. In HTA, pursuant to the
2 excise taxes, Treasury is required to deposit the excise taxes
3 into a special fund, quote, in favor of, and in the name of,
4 and for the benefit of HTA, and transfer the excise taxes to
5 HTA's bank account, shall be covered into a special deposit
6 and shall transfer.

7 The Commonwealth has also pledged not to reduce the
8 taxes and to ensure that said amount shall be covered into a
9 special deposit, in the name of and for the benefit of HTA.
10 The Commonwealth thus collects and briefly holds the excise
11 taxes solely in a trust capacity.

12 And on the Lift Stay Motion, the Oversight Board's
13 counter-argument to defendants' argument that this language
14 also gave rise to a trust in favor of the creditors was that
15 the statutes allowed the instrumentalities to use the money
16 for other corporate purposes. And whether or not that's
17 right, after bonds have been issued, is a question that we
18 dispute. But there's no suggestion that the trust wouldn't
19 extend to the instrumentalities, giving them a property
20 interest.

21 And similarly, in PRIFA, Section 1914 of the Enabling
22 Act provides that monies, quote, when received by the
23 Department of Treasury of Puerto Rico, shall be covered into a
24 special fund to be maintained by or on behalf of PRIFA. And
25 that's exactly what's happening now.

1 After being deposited in the Lockbox Account, the
2 first 117 million are being transferred with a note saying
3 "for deposit to the credit of PRIFA," and credited to the
4 Infrastructure Fund, the special fund maintained by the
5 Commonwealth for the benefit of PRIFA. But all of the first
6 proceeds are property of PRIFA. Regardless of whether they
7 are actually credited to the infrastructure fund, though, is
8 evidenced by Section 1906(m), among others, which authorized
9 PRIFA to -- well, 1906(m) authorizes PRIFA to pledge its
10 property to secure debt issuances, including, I'm going to
11 quote, "all or any portion of the federal excise taxes or
12 other funds which should have been transferred by the
13 Commonwealth to the Authority."

14 So they have the right to pledge the monies that
15 should have been transferred by the Commonwealth to the
16 Authority, but were not. So clearly, they have an interest in
17 those monies that allows them to pledge. The non-transfer of
18 monies does not reduce PRIFA's property or its ability to
19 pledge that property.

20 And the Commonwealth also again covenanted not to
21 limit or alter the rights given to PRIFA until all the bonds
22 are paid in full. At a very minimum, there's a factual
23 question regarding the nature of the fund into which the
24 monies are being credited and PRIFA's rights with respect
25 thereto.

1 And with respect to CCDA, the money is held in an
2 account in the name of the Tourism Company, controlled
3 entirely by the Tourism Company. They've been designated as
4 restrictive in cash balance analysis by the Oversight Board on
5 the basis that the Commonwealth has no means to access the
6 money, and that the Commonwealth cannot even de facto obtain
7 the cash in the account by reducing appropriations, because
8 there are no annual appropriations to the Tourism Company.

9 The Oversight Board acknowledges here that, "the
10 Tourism Company may have their legal title or similar
11 attenuated property interest in the occupancy tax revenues."
12 Well, we dispute the characterization, but the acknowledgment
13 that CCDA has a property interest defeats summary judgment on
14 407 with respect to that.

15 Its argument that that property interest --

16 THE COURT: Just one --

17 MS. MILLER: Yes.

18 THE COURT: Just one second. So you're saying
19 that -- surprisingly, I didn't memorize every single word of
20 all of the briefs. So you're saying that the Oversight Board
21 acknowledged that the Tourism Company has some sort of bare
22 title interest, or that the CCDA has that interest as to money
23 in accounts of the Tourism Company? I'm just trying to make
24 sure I followed your last statement.

25 MS. MILLER: Sure. It's Reply paragraph 114, at note

1 63, and it's that the Tourism Company has it. But 407 isn't
2 limited to -- 407 doesn't require the instrumentality to which
3 the proffer -- the money has to flow to be the obligor on the
4 debt. So the Tourism Company is an instrumentality. There's
5 no question that this is property of an instrumentality of the
6 debtor -- of the Commonwealth rather.

7 THE COURT: Thank you.

8 MS. MILLER: And so it's the Oversight Board's
9 argument that that property interest is insufficient for 407,
10 is -- I mean, they don't cite any support for it, and frankly,
11 it's not supported.

12 The fact that all of the statutorily pledged excise
13 taxes are, at a minimum, property of the respective
14 instrumentalities, frankly makes academic our dispute with the
15 Oversight Board about the elements of the second prong of 407.
16 The second prong makes actionable any transfer which deprives
17 a territorial instrumentality of property in violation of
18 applicable law, assuring the transfer of such property to such
19 territorial instrumentality for the benefit of its creditors.
20 That is a mouthful.

21 The Oversight Board, however, reads the beginning of
22 the first prong of 407, quote, as any property of any
23 territorial instrumentality is transferred as an element of
24 the second prong as well. The Oversight Boarding argues that
25 it has to be right, because that is the "if" in the "if-then"

1 sequence. But frankly, there's no reading of Section 407
2 that's grammatically correct, regardless of whose position is
3 adopted. So applying grammatical rules seems to be misplaced
4 here.

5 The result of the Oversight Board's reading is that
6 the second prong requires, as Mr. Bienenstock explained this
7 morning, an instrumentality getting money and then losing it.
8 So a transfer of property of an instrumentality, and then a
9 transfer that deprives the instrumentality of that property,
10 and then the deprivation and violation of a law assuring the
11 transfer for the benefit of creditors.

12 This strips the word "deprive" used in the statute
13 twice of any meaning. "Deprived" means to deny possession or
14 use of something. It's different from taking or even clawing
15 back, which is what the Oversight Board wants to reinterpret
16 it as.

17 The Oversight Board's interpretation also makes this
18 prong, read in its entirety, both illogical and impossible.
19 407 requires the deprivation to be in violation of a law that
20 assures the transfer of property to the instrumentality.
21 Well, how can a transfer of money from an instrumentality ever
22 be in violation of a law assuring the transfer of property to
23 that instrumentality?

24 Congress had the diversion of revenues from the
25 revenue bonds in mind when drafting and adopting Section 407,

1 and they added the second prong for a purpose, not merely to
2 address a theoretical impossibility. Defendants'
3 interpretation, by contrast, gives meaning to the second
4 prong, in particular by covering transfers which deprive the
5 instrumentality of property that was statutorily obligated to
6 it.

7 This interpretation is also the one that conforms
8 with how the word "such" is used throughout Section 407. In
9 almost all other instances in that section, property is
10 qualified by the word "such," referring the reader back to the
11 last description of the property, and it could have in the
12 first sentence of the second prong as well. The second prong
13 of Section 407, however, begins by simply using the word
14 "property," meaning if the instrumentality is deprived of
15 property, any property in violation of a law that assures the
16 transfer of such property, i.e., the property being withheld
17 from the instrumentality for the benefit of the creditors,
18 then the transferee is liable. It doesn't have to be property
19 of the instrumentality.

20 The Oversight Board also argues that there have been
21 no transfers at all, and that the mere withholding of monies
22 is not sufficient to give rise to a claim under 407. Based on
23 the limited factual record, this appears to be factually
24 incorrect. It's also a question of fact, which would preclude
25 summary judgment and the required discovery.

1 THE COURT: Would you --

2 MS. MILLER: The CCDA --

3 THE COURT: Oh, are you wrapping it up?

4 MS. MILLER: Sure. Yes. I'm going to walk through
5 each of them.

6 So at CCDA, as you heard Mr. Kass say, there is no
7 dispute that there was at least one transfer from the Tourism
8 Company to the Commonwealth after the Oversight Board was
9 created. Mr. Kass then said, well, defendants have all of the
10 evidence they need about all of the other transfers and they
11 haven't identified any.

12 Well, what we have is evidence of Tourism Company
13 accounts, but what we don't have is any evidence of who the
14 recipient was. And we actually asked for that information.
15 We identified, as outlined in our 56(d) Motion, a number of
16 transfers out of Tourism Company accounts where the recipient
17 was not identified, and which we couldn't match to an in -- a
18 credit to -- on another account statement. And those could
19 have been to the Commonwealth. We have no way of knowing
20 whether or not those were transfers to a Commonwealth account
21 or not. And discovery should be allowed at least to
22 determine whether or not those were made into Commonwealth
23 accounts.

24 And with respect to PRIFA and HTA, the Oversight
25 Board bases its no transfer argument on a line of cases

1 | stating generally that the withdrawal or deposit of cash in
2 | hand into one's unrestricted checking account is not a
3 | transfer, as those monies have the same legal character
4 | whether in your pocket or in your checking account.

5 | As an initial matter discussed in our Brief, the
6 | Oversight Board's narrow interpretation of the word "transfer"
7 | ignores the numerous cases holding to the contrary, as well as
8 | the broad interpretation afforded to the term "transfer" both
9 | by the First Circuit, in the legislative history of Section
10 | 101(54) of the Bankruptcy Code, which expressly provides that
11 | a deposit in a bank account or similar account is a transfer.

12 | So even under the cases that the Oversight Board
13 | relies on, where a checking account is not a transfer --

14 | (Sound played.)

15 | MS. MILLER: -- and these monies have the same legal
16 | character, that's not the situation here. So with respect to
17 | both HTA and PRIFA, on HTA monies collected and then deposited
18 | to the credit of Fund 278, that designation carries with it
19 | certain restrictions reflected in the Commonwealth's
20 | accounting statements, making it different from simply
21 | unrestricted, untagged cash in the bank.

22 | And with respect to PRIFA, the monies are deposited
23 | first into a lockbox account, which has -- is an escrow
24 | account which has particular restrictions. The Commonwealth
25 | doesn't have access, cannot access them as it would cash in

1 hand. And then those monies are transferred into various
2 accounts, some of which go with restrictions, and others
3 don't. But clearly, those are transfers that are changing the
4 legal character and restrictions imposed on the funds.

5 With respect to the final element of the second
6 prong, that the deprivation is in violation of a law assuring
7 the transfer, the Oversight Board actually doesn't even
8 challenge that the laws at issue assure the transfer of
9 property for the benefit of creditors. And we've already
10 discussed the Oversight Board's contention that no such law
11 was violated because each was preempted.

12 So before I pass the virtual podium to Mr. Berezin,
13 and I hope I can squeeze this in, I just want to make one
14 comment in particular about CCDA, because I think what the
15 Oversight Board is doing on this Motion, frankly, is a little
16 bit of smoke and mirrors. And in trying to recognize Your
17 Honor's ruling, what they're saying, what you heard Mr. Kass
18 say is, we're only now asking for partial, partial summary
19 judgment with respect to this new category of revenues called
20 retained occupancy taxes, which are defined as occupancy taxes
21 not deposited in the transfer account.

22 Well, the limited discovery that we have shows that
23 this is actually a null set. There is not a single dollar of
24 hotel occupancy taxes --

25 (Sound played.)

1 MS. MILLER: -- that did not flow through this --
2 Your Honor, if I could just --

3 THE COURT: You can finish your thought.

4 MS. MILLER: Thank you. That didn't flow through the
5 Scotia Bank 5142 account. The Oversight Board is, therefore,
6 asking for a hypothetical advisory opinion, and, at the very
7 minimum, it is their burden to show that there are facts that
8 these rulings would actually apply to. And on that basis,
9 summary judgment should be denied with respect to all of the
10 claims with -- as respect to CCDA.

11 Thank you.

12 THE COURT: Thank you, Ms. Miller.

13 And so now, Mr. Berezin.

14 MR. BEREZIN: Yes, Your Honor. Good afternoon.
15 Robert Berezin.

16 THE COURT: Good afternoon.

17 MR. BEREZIN: Thank you. Robert Berezin, Weil,
18 Gotshal, & Manges, representing National Public Finance
19 Guarantee Corp.

20 I will address for the Monolines the Contract Clause
21 issues raised in the Board's Summary Judgment Motion. I just
22 note at the beginning that the Board did not move for summary
23 judgment that any impairment was reasonable and necessary, nor
24 have they proffered evidence on that issue, so it would be
25 improper for them to obtain summary judgment on an issue that

1 they raised literally at the midnight hour. And I won't
2 address any of those points, as they were not in the papers.

3 So I'm going to begin, Your Honor, with whether a
4 change in Commonwealth law impaired bondholders' contracts,
5 and on that point, there's really no dispute that, after
6 November of 2015, Commonwealth law was the opposite of what it
7 was before. It required excise taxes to be withheld from HTA
8 and the other instrumentalities. And the record before the
9 Court shows that this change in law has been continuously in
10 effect since November 2015, and notwithstanding the enactment
11 of PROMESA or the filing of the Title III case.

12 Now, in the Motion, the Board argues that this sea
13 change happened due to executive action, but that's not --
14 that's not so. The impairment began with the Emergency
15 Orders, but the Emergency Orders were legislative actions.
16 They were premised on the police power, which, under the
17 Commonwealth Constitution, is a legislative power. They were
18 also premised on the clawback provisions of the Constitution,
19 and Constitu -- State Constitution or Commonwealth
20 Constitution is a law for purposes of the Contract Clause.

21 The second Emergency Order has the same -- the same
22 components. It also purported to be issued under the
23 delegated authority pursuant to the OMB Act. So it's
24 additional -- for that additional reason, it was a legislative
25 action.

1 For the Moratorium Act and the Moratorium Orders, the
2 Moratorium Act obviously is legislative. Any act -- expressly
3 delegated the legislature's police power to the Governor, and
4 the Moratorium Orders in turn were expressly issued under the
5 Moratorium Act and purported to exercise the legislature's
6 police power, again under the Commonwealth's Constitution, a
7 legislative power. Nor did the Moratorium Orders merely
8 execute or carry out the provisions of the Moratorium Act.
9 Instead, the Governor was delegated the power to decide, one
10 way or another, whether the legislature's police power should
11 apply and would apply to the Commonwealth or its
12 instrumentalities.

13 And indeed, the Court has already ruled that it was
14 plausible that the Moratorium Orders constituted exercises of
15 delegated state legislative power and are, therefore, laws in
16 the *Ambac* decision. And we note that that decision was based
17 on the same record that's before the Court. Namely, the text
18 of the Moratorium Act and the moratorium laws. There was
19 nothing special or specific in the allegations that would not
20 be in this, presently before the Court. So the Moratorium
21 Orders are laws for purposes of the Contract Clause, certainly
22 at this stage.

23 Finally, the Fiscal Plan Compliance Act is obviously
24 a legislation -- a piece of legislation, and is, therefore, a
25 law under the Contract Clause. So we're not dealing with mere

1 executive action.

2 The Board's second primary argument is that the
3 taking of the excise taxes was permitted by the contracts
4 because there was a valid clawback in each fiscal year since
5 fiscal year 2016. And I would note, Your Honor, whether a
6 valid clawback was in effect rests at least in part on
7 disputed factual contentions. That is what the Court found
8 just this month in connection with the CCDA Lift Stay Ruling,
9 and that must be true as well on summary judgment,
10 particularly one filed before answers and discovery.

11 Mr. Natbony pointed out numerous factual issues that
12 are implicated when one needs to determine whether a valid
13 clawback under the Constitution was in effect for each fiscal
14 year. I will just briefly touch on a few specific examples
15 where the Board contends that they were met.

16 So, in the first instance, the Board points to a
17 legislative finding in PROMESA, Section 405, but those
18 findings are a complete mismatch to the requirements of a
19 valid clawback. We describe that in detail in our Sur-reply.
20 I won't repeat it, but I think, more importantly, a
21 legislative finding is insufficient to resolve genuine issues
22 of fact on summary judgment, particularly where, as you know,
23 all reasonable inferences have to be drawn in defendants'
24 favor.

25 The Board also argues that, well, the -- upon the

1 filing of the Title III, all 13 billion of GO debt
2 automatically accelerated and became due, and therefore,
3 available resources were insufficient. But again, in our
4 papers, we demonstrated why that's wrong.

5 Just a few points there. There's no automatic
6 acceleration provision in the Bankruptcy Code, so you have to
7 default to what the rights of the parties were under
8 Commonwealth law. That's the premise of bankruptcy. It
9 doesn't change contract rights or other rights absent an
10 express provision in the Code.

11 And the fact that bankruptcy law values a bankruptcy
12 claim for the full amount of debt doesn't override and has
13 nothing to do with when interest and principal payments are
14 due under Commonwealth law, or how the valid clawback should
15 be determined under the Commonwealth Constitution. And the
16 Commonwealth Constitution clearly contemplates interest and
17 principal payments would come due over time, and there would
18 be no acceleration, so they clearly haven't met their burden
19 on summary judgment on that issue.

20 Even if available resources, excluding the excise
21 taxes, which are given a second priority under the
22 Constitution and OMB Act, were insufficient to service GO
23 debt, then the excise taxes can be used, but only to pay GO
24 debt during that year. And the Board cannot show that this
25 occurred, excise taxes weren't used to pay GO debt. And so

1 | what the Board points to is, well, the Proposed Plan of
2 | Adjustment. And that doesn't work for multiple reasons that
3 | we pointed out in our papers.

4 | I won't belabor those either, but given all of this,
5 | Your Honor, there are simply no grounds to grant summary
6 | judgment on the question of whether there was no impairment
7 | because of a valid clawback.

8 | That brings us to the Board's argument that voluntary
9 | defaults caused the impairment. We would just note, Your
10 | Honor, that there's no rule of law that a government can
11 | change laws, violate statutes without any consequence under
12 | the Contract Clause when there's a substantial impairment.
13 | There's no case that says to the contrary, that authorizes
14 | such a thing.

15 | And this isn't just a breach of contract or a default
16 | standing alone. There was a change in law that upended the
17 | rules upon which the agreements were entered, and that caused
18 | a substantial impairment. And the Board's argument that the
19 | legislative acts only delayed payment, they don't abrogate
20 | bondholders' contractual rights, so, therefore, there's no
21 | substantial impairment, is just wrong.

22 | The way that substantial impairment -- the
23 | substantial impairment inquiry is set up, the reasonable
24 | expectations of bondholders are paramount. And there's no
25 | question on summary judgment that the reasonable expectation

1 of bondholders, or that excise taxes that were explicitly
2 referenced in all of the official statements that went along
3 with these bonds would be enacted, would not be changed, and
4 that those funds would flow to HTA and to the other
5 instrumentalities to permit timely debt service.

6 So when that flow of funds stopped for years due to
7 legislative acts, that was a substantial impairment under the
8 cases that we have cited and under Contract Clause
9 jurisprudence generally. In addition, the legislative action
10 here deprived bondholders of security under their contracts.
11 That's true even under the Court's Lift Stay Ruling, because
12 valuable property rights that otherwise would have attached
13 had the flow of funds continued, did not attach due to the
14 change in law. That is clearly a substantial impairment for
15 sure.

16 So this is a Contract Clause violation. It's not a
17 simple default. And that is -- that is another reason why the
18 Board's arguments in favor of summary judgment fail.

19 Next, the Board argues that, well, federal law is
20 really what caused the impairments. And so, okay, even
21 assuming that there are substantial impairments here, they
22 were caused by federal law.

23 They point to Title III in the first instance. So in
24 Title III, Your Honor, it's clear that governments --
25 government debtors have -- just like any other debtor, have to

1 | comply with the laws while in bankruptcy. There's no rule
2 | that exists in the Bankruptcy Code, there's no section of the
3 | Bankruptcy Code that excuses government debtors from complying
4 | with statutory law.

5 | And this was addressed explicitly in *In Re: New York*
6 | *City Off-track Betting Corp*, at 434 B.R. 131. And certainly,
7 | in bankruptcy, the default for creditors' rights is state's --
8 | or in this case Commonwealth law, unless there's a specific
9 | Bankruptcy Code provision that displaces that law. And no
10 | provision that has been invoked in Title III by the
11 | Commonwealth abrogates the Excise Tax Statutes or requires or
12 | authorizes the Commonwealth to violate them.

13 | The Board points to the automatic stay, and a lot of
14 | the arguments they're making here really go to whether there's
15 | an immediate remedy for these violations. But that's a
16 | different question than whether those obligations exist and
17 | give rise to actionable obligations.

18 | And we've certainly moved the Court for -- to lift
19 | the stay so that we can pursue our remedies, but the purposes
20 | of summary judgment, the obligation in these Excise Tax
21 | Statutes absolutely continue in spite of Title III. Certainly
22 | when we get to, as Ms. Miller indicated, the Plan of
23 | Adjustment, that's a different issue, and we'll get there when
24 | we get there. But to move for summary judgment now and to
25 | point to something in the Bankruptcy Code to say that the

1 obligations don't exist or that there's no -- that there's
2 preemption, is inconsistent with the statutory text. It is
3 incorrect.

4 The Board also points to the power of rejection. I
5 think it backed away from that to a certain extent today, but
6 statutes can't be simply rejected. And in any event, it's a
7 hypothetical. The Commonwealth has never invoked Section 365
8 in respect of the bonds, in respect of the Excise Tax
9 Statutes, so it's irrelevant. And rejection, in any event,
10 doesn't destroy underlying contract rights, as was made clear
11 in the Supreme Court's decision in *Mission Products Holding*
12 *versus Tempnology*.

13 The next court refers to Title II and argues, well,
14 it was Title II that caused the impairment. But we heard
15 today that the budgets only address payments and do not
16 address what do not need to be paid. And therefore, they
17 don't eliminate the excise tax obligations. And that may be,
18 but what's happening, as I explained before, is clearly a
19 substantial impairment for all the reasons I've said.

20 And that -- and to the extent that the Board is
21 relying on the budgets as the culprit for that substantial
22 impairment, then that would raise Contract Clause issues,
23 assuming that the Board -- that the Budgets are really
24 relevant. And I just want to start with that threshold
25 question.

1 The Board, throughout its arguments, assumes that the
2 Fiscal Plan and Budget provisions pertain to the Excise Tax
3 Statutes, and that's a fundamental, mixed legal and factual
4 dispute. The Commonwealth Fiscal Plans and Budgets address
5 resources that exclude the excise taxes, and this is clear in
6 PROMESA, in Section 201(b)(1)(A), which provides that fiscal
7 plans and budgets must be based on applicable law, which
8 includes the Excise Tax Statutes that specifically exclude
9 them from Commonwealth resources, as well as Section
10 201(b)(1)(M), which prohibits the Commonwealth from using
11 assets, funds, or resources of a territorial instrumentality.

12 And under the Excise Tax Statutes, the excise taxes
13 are HTA's funds, such as Fund 278, and resources, which is a
14 broad term; and therefore, the excise taxes fall outside the
15 scope of the resources covered by the Commonwealth fiscal
16 plans and budgets. And at a minimum, there's at least a
17 question of fact as to those issues, given the budgeting and
18 other evidence that we have proffered. But even if the
19 budgets were meant to include excise taxes, which we dispute,
20 the budgets would be Commonwealth legislative actions.

21 FOMB is part of the Commonwealth government.
22 Budgeting is a quintessential legislative exercise. The
23 budgets, as you pointed out, Your Honor, they can be deemed
24 approved by the Commonwealth Governor and Legislature just
25 like any other Commonwealth law. So a certified budget is a

1 Commonwealth budget. It's not federal law.

2 So even if the Commonwealth budgets are the culprit
3 behind the impairment, as opposed to the moratorium laws or
4 acts and other Commonwealth pre-PROMESA enactments and
5 post-PROMESA orders, there still would be a Contract Clause
6 violation. But the Board argues that Title II of PROMESA
7 expressly authorized or required the budgets to exclude excise
8 tax transfers. That's an important issue, because if PROMESA
9 doesn't expressly authorize or require the budgets to exclude
10 excise tax transfers, then federal law did not cause the
11 impairment. FOMB's local legislative actions did.

12 So to show that PROMESA expressly authorizes or
13 requires excise taxes to be excluded, the Board points to
14 PROMESA's provision granting the Board budgeting authority,
15 but those provisions nowhere authorize or require the Board to
16 certify a budget that violates the Excise Tax Statutes or that
17 requires retention of the excise taxes. To the contrary,
18 numerous provisions in PROMESA show that the fiscal plans and
19 budgets should respect the Excise Tax Statutes. But in all
20 event -- clearly, federal law does not expressly authorize or
21 require the budgets to override the Excise Tax Statutes.

22 (Sound played.)

23 MR. BEREZIN: I'm showing I still have a couple
24 minutes, Your Honor?

25 THE COURT: Yes. That was the two-minute warning.

1 MR. BEREZIN: Oh. Great. Perfect.

2 So FOMB's real argument underneath it all, because it
3 can't point to an express provision that authorizes a budget
4 to violate these statutory provisions, the real argument is
5 that it's impossible for them to both certify a compliant
6 budget and respect the Excise Tax Statutes, because if FOMB
7 could have certified a compliant budget that respected those
8 statutes, then federal law did not cause the impairment, and
9 the budgets, which would be legislative acts, would violate
10 the Contract Clause.

11 And of course whether a budget would have -- whether
12 a budget could have transferred the excise taxes and complied
13 with PROMESA obviously presents profound factual issues that
14 would preclude summary judgment.

15 I would just note at the end, Your Honor, 106(e) does
16 not deprive the Court jurisdiction to determine if a Contract
17 Clause violation occurred. The Court itself recognized that
18 in *Ambac*. And it certainly doesn't preclude the inquiry we
19 just discussed, as to whether a fiscal plan or budget could
20 have complied with PROMESA and permitted the flow of excise
21 taxes, an inquiry necessary to determine whether the Title II
22 powers that the Board has really required, really required the
23 impairments that occurred here.

24 With that, I'll conclude, Your Honor, unless you have
25 questions.

1 THE COURT: No. You were very thorough. Thank you,
2 Mr. Berezin.

3 MS. MILLER: Your Honor, Atara Miller.

4 THE COURT: Yes.

5 MS. MILLER: Your Honor, if I may use Mr. Berezin's
6 last 20 seconds, I just have one small point that I realized I
7 neglected to address.

8 THE COURT: Okay.

9 MS. MILLER: On 56(d), with respect to PRIFA, Your
10 Honor asked Mr. Firestein about our assertion and showing that
11 there are some questions related to the bond documents and
12 whether it is a complete set. And I just want to note that
13 Mr. Firestein suggested that we're making great weight of it,
14 but doesn't actually argue that --

15 (Sound played.)

16 MS. MILLER: -- that the documents --

17 THE COURT: You can finish.

18 MS. MILLER: Thank you, Your Honor. That the
19 documents before the Court are actually the operative or the
20 complete set, which would be their burden on summary judgment.
21 And we've raised a question that at least entitles discovery
22 as to that point. It would seem that resolving that issue
23 would be a necessary predicate to any final, binding legal
24 determination about the bondholders' rights under the
25 documents that we are talking about.

1 Thank you.

2 THE COURT: I just have a couple of questions for you
3 about those documents. On the Trust Agreement discovery
4 issue, from your discussion, it seems like the Supplemental
5 Agreements would just be older versions of the '97 Agreements,
6 and so why would those be material to this motion practice,
7 besides obviously they'd be good to have? But why are those
8 --

9 MS. MILLER: So I think, Your Honor, if you look at
10 the document, it's actually hard to know what the supplements
11 would be and whether the document that's added, the '97
12 version, is just the '88 -- a copy, you know, an updated font,
13 but express duplicate of the '88, but incorporating the first
14 and second supplements, or whether it was all integrated into
15 a new sort of whole body.

16 And so that's exactly what we're trying to figure
17 out, which is, it would seem, based on the signature page and
18 the notary page, that the new, updated Trust Agreement is
19 really just a retyped, you know, from typewriter to word
20 processor, version of the '88 Trust Agreement. But the cover
21 isn't indicating that it was amended by these two supplemental
22 agreements, which have not been put in the record and we have
23 not been able to obtain in discovery.

24 So I don't know, you know. I can only speculate
25 about what it might be. That's my best guess about why that

1 document looks so weird and what it might mean. I wish I had
2 a better answer for Your Honor.

3 THE COURT: And the second question I have is that,
4 as to the 2005 Supplemental Agreements, you make a
5 representation that you have a good faith basis for claiming
6 that it exists. Can you be any more explicit about your
7 factual basis for that belief?

8 MS. MILLER: So our basis for that belief is
9 discussion with the current Trustee.

10 THE COURT: Thank you very much.

11 At this point, we will start our lunch break. When
12 we come back at 2:15, we will go on to the argument by the DRA
13 Parties and then the rebuttal arguments.

14 Thank you, Counsel, for these arguments this morning.
15 I hope everyone has a little bit of a chance to rest. I'm
16 going to a meeting, but I hope you can rest. And I will look
17 forward to hearing you all at 2:15.

18 Take care. We are adjourned.

19 (At 12:50 PM, recess taken.)

20 (At 2:19 PM, proceedings reconvened.)

21 THE COURT: Buenas tardes. This is Judge Swain.

22 Good afternoon, everyone.

23 MS. NG: Hi, Judge.

24 THE COURT: Hi, Lisa.

25 And so we are ready to continue the hearing with the

1 arguments from the DRA Parties. I have 16 minutes allocated.

2 And who will be starting?

3 MR. MINTZ: Good afternoon, Your Honor. Doug Mintz
4 of Orrick on behalf of the DRA Parties, and I'm joined by our
5 co-counsel, Nayuan Zouairabani, from McConnell Valdes.

6 THE COURT: Good afternoon, Mr. Mintz and
7 Mr. Zouairabani.

8 MR. MINTZ: Thank you. Good afternoon, Your Honor.
9 I wish you and all of my friends and colleagues here health
10 and safety, and hope we will get together sometime soon.

11 THE COURT: I share those hopes and communicate those
12 good wishes as well.

13 MR. MINTZ: Thank you, Your Honor. Thank you.

14 THE COURT: We'll start your clock now.

15 MR. MINTZ: Thank you. Your Honor, as you know, the
16 DRA Parties are not defendants here, but we have grave
17 concerns about the sweep of some of the arguments that
18 Mr. Bienenstock has made today and that the Oversight Board
19 has made in some of their pleadings. Those stand to have an
20 impact on certainly the DRA, but a number of parties that are
21 not even in the room, if the Court were to adopt some of them,
22 some wholecloth.

23 And the Monolines did a very good job at pushing back
24 on a number of those points, but we will speak briefly on
25 three of them and hopefully avoid too much repetition. I'll

1 speak first on preemption, which is limited by PROMESA with
2 respect to Commonwealth law, and then Mr. Zouairabani will
3 explain why Acts 30 and 31 are not appropriation statutes, and
4 thus, not preempted; and how the Oversight Board has failed to
5 provide any evidence that they have triggered the so-called
6 clawback.

7 So first, with respect to preemption, PROMESA does
8 not preempt Acts 30 and 31. Congress struck a careful balance
9 with PROMESA and only displaced a narrow category of
10 Commonwealth law, and Acts 30 and 31 are not among them.

11 In Section Four of PROMESA, Congress states "the
12 provisions of this Act shall prevail over any general or
13 specific provisions of territory law, state law or regulations
14 that are inconsistent with this Act." PROMESA is not a
15 steamroller that flattens every law in its path. Congress
16 created a scalpel that removes only directly contradictory
17 statutes, which makes sense. This is not some broad field
18 preemption.

19 The Oversight Board argues that the Fiscal Plan and
20 Budget preempt Acts 30 and 31. This stretches Section Four
21 far beyond its breaking point. Acts 30 and 31 do not
22 contradict any provision of the statute. They are consistent
23 with the statute, as you'll see, and PROMESA makes no effort
24 to preempt them expressly. To the contrary, the Fiscal Plan
25 and Budget actually must incorporate relevant Commonwealth

1 law.

2 And we list a number of these provisions in our
3 pleadings, but for one example, Section 201(b)(1)(N) of
4 PROMESA says that any fiscal plan shall respect the lawful
5 priorities and lawful liens as may be applicable in the
6 Constitution, other laws or agreements of the covered
7 territory.

8 So it's impossible to see how Congress intended for
9 PROMESA to preempt provisions like Acts 30 and 31. We can
10 debate what Acts 30 and 31 actually mean, and I'm sure we will
11 at length, but clearly they remain in place. And because, as
12 Mr. Zouairabani will explain, those statutes are not
13 appropriation statutes, the excise tax revenues should belong
14 to HTA, and DRA should have a lien on those revenues.

15 The Oversight Board tries to argue this is a settled
16 issue. They state that the First Circuit and this Court have
17 consistently held PROMESA preempts Puerto Rico statutes
18 appropriating money because the budget necessarily must
19 contemplate all expenditures. But those decisions, like
20 *Vazquez Garced*, one -- simply state that the Commonwealth
21 can't go and spend on its own outside the budget and fiscal
22 plan. They don't have anything to do with Acts 30 and 31,
23 which are not budgetary allocations or even appropriations, as
24 Mr. Zouairabani will explain.

25 In essence, the Oversight Board wants to use the

1 Fiscal Plan, a document that can't be questioned by anyone, to
2 take interests in the excise tax revenues. The DRA has a lien
3 on those revenues through HTA, and those liens are property.
4 Bankruptcy law has always been read to protect secured
5 property interests from being taken without compensation. And
6 case law makes clear, Supreme Court case law, that the Court
7 should not construe a statute to interfere with the DRA's
8 property rights, or anyone's property rights, without
9 Congress' express statement of their intent to do so. And
10 that's referencing *Security Industrial Bank*, 459 U.S. at 79.

11 The Oversight Board argues they aren't extinguishing
12 the lien, just the revenue source behind the liens, but
13 preserving the property right and the lien. But that's just
14 word play. Extinguishing the funding source of those revenues
15 without providing adequate replacement nullifies the lien and
16 destroys the property interest.

17 We don't think this is the context to make such broad
18 and overarching rulings that could affect so many people,
19 including many people not here today, in a way that we believe
20 would be unconstitutional. We believe those issues are not
21 ripe today, and urge you not to head in that direction.

22 And with that, I will yield to Mr. Zouairabani at
23 this point.

24 THE COURT: Thank you.

25 MR. ZOUAIRABANI TRINIDAD: Good afternoon, Your

1 Honor. Nayuan Zouairabani of McConnell Valdes on behalf of
2 the DRA Parties.

3 THE COURT: Good afternoon.

4 MR. ZOUAIRABANI TRINIDAD: Good afternoon.

5 I would like to start off with the concept of
6 appropriation. As explained in our brief, the Act 30-31
7 revenues do not satisfy the framework to be deemed an
8 appropriation. They are not funds which flow into the
9 Commonwealth Treasury for discretionary use, and they are not
10 subject to annual allocation in the Commonwealth's budget on a
11 fiscal year by fiscal year basis. Put another way, if it does
12 not walk like a duck and does not quack like a duck, then it
13 is very clearly not a duck.

14 The legislature knows how to create appropriation
15 statutes, but chose not to do so in this case. The
16 legislature's intent with the Act 30-31 revenues is therefore
17 clear: One, they are not discretionary Commonwealth
18 appropriations; two, they are required to be covered into a
19 special deposit for the benefit of HTA for the specific
20 purpose of repaying particular creditors of HTA; and three,
21 the Commonwealth is obligated to transfer and convey these
22 revenues to HTA under Article VI, Section Nine of the
23 Constitution, subject only to the extraordinary exception of
24 the clawback, which, as we will discuss shortly, has not
25 occurred here.

1 Moreover, the First Circuit decisions of
2 *Vazquez-Garced 1*, *Mendez-Nunez*, and *Andalusian* do not assist
3 the FOMB in this regard. The first case concerns the
4 reprogramming of items from the Commonwealth's annual budget;
5 the second concerns litigation of whether -- reduction of the
6 Puerto Rico Legislature's budget; and the third addressed a
7 controversy over the ERS Statute, which requires specific
8 annual allocations in the Commonwealth's budget.

9 All of these decisions revolve around particular
10 items in the annual Commonwealth budget that require specific
11 budgetary allocations. The Act 30-31 revenues do not. Hence,
12 none of these cases are applicable to it.

13 The FOMB tries to bypass it by relying on two
14 additional grounds. First, that Acts 30 and 31 are subject to
15 the rights of future legislatures to review or amend; and
16 second, their underlying belief that any other interpretation
17 would make it impossible to fulfill their mandate under
18 PROMESA.

19 The FOMB's first argument is irrelevant, because to
20 date, neither the Commonwealth nor the Puerto Rico Legislature
21 have taken any action to repeal or amend Acts 30 and 31.
22 Rather, the only party that has consistently attempted to do
23 so is the FOMB itself, acting outside their mandate through
24 certified budgets and fiscal plans.

25 As discussed in our briefing, the FOMB cannot use

1 their certified budgets and plans as a means to amend Acts 30
2 and 31, because they do not possess the power to legislate.
3 This second argument requires careful scrutiny as it can lead
4 to a very dangerous path. And this relates both to the issue
5 on appropriations, as well as preemption, as Counsel Mintz
6 just discussed.

7 As the Court noted when the FOMB sought to appoint a
8 chief transformation officer for PREPA, Congress created a
9 carefully calibrated framework when it enacted PROMESA. It
10 could have chosen to grant the FOMB greater control over the
11 government and its operations, but it did not do so. PROMESA
12 says what it means and it means what it says.

13 As Counsel Mintz explained, PROMESA specifically
14 preserves Commonwealth law related to creditor priority,
15 security and property rights. Moreover, Title III does not
16 incorporate the majority of the payment priority under Section
17 507 of the Bankruptcy Code. And Section 314(b)(6) of PROMESA
18 specifically mandates that, in confirming a Title III plan,
19 the Court must consider whether available remedies under the
20 Commonwealth laws and Constitution would result in a greater
21 recovery to creditors than as provided in the plan.

22 Bear in mind, Your Honor, that Congress decided to
23 make Title III's best interest test significantly different to
24 the one set forth in Chapter Nine. The FOMB cannot, through
25 the guise of fulfilling its mandate, take certain sections of

1 PROMESA out of context, just as they did in the *PREPA* case, by
2 the way, to turn it into a weapon to preempt laws they deem
3 problematic, like Acts 30 and 31, or even the Puerto Rico
4 Constitution, as they alluded to in their Reply.

5 By the same token, they cannot use PROMESA to convert
6 the Act 30-31 revenues into appropriations that can be
7 discretionarily disposed of through certified plans and
8 budgets. If we follow the FOMB down this rabbit hole, it
9 will not stop until they essentially rewrite PROMESA to make
10 it easier for them to plot forward with their current Fiscal
11 Plans, Budgets, and Title III Plans in an attempt to obtain
12 unfettered quasi monarchical powers over the Government of
13 Puerto Rico and, ultimately, the people of Puerto Rico.

14 Now, having addressed the FOMB's preemption
15 appropriation arguments, the FOMB is now forced to address the
16 two ton elephant in the room. That is, the validity of a
17 clawback.

18 As a housekeeping matter, Your Honor, it is the DRA's
19 position that by raising the applicability of clawback in
20 these proceedings, the FOMB has conferred this Court with
21 jurisdiction to adjudicate this controversy on its merit, and
22 thus, has waived any arguments regarding the limitations of
23 Section 305 of PROMESA on this issue.

24 Having clarified with you, we now turn to why the
25 FOMB has failed to show compliance with clawback. The

1 requirements for activation of a clawback under Puerto Rico
2 law is quite complex, and it's not just limited to one
3 element, as the FOMB oversimplifies in their briefings.
4 Article VI, Sections Seven through Nine of the Puerto Rico
5 Constitution, the OMB Act, and Acts 30 and 31 allow for the
6 potential application of the clawback to the Act 30-31
7 revenues, but only when, one, the fiscal year began with a
8 balanced budget; two, available resources for the fiscal year
9 are insufficient to cover GO debt service; and three, the
10 funds can only be used to pay interest and amortization on GO
11 debt.

12 Under all other circumstances, Article VI, Section
13 Nine of the Constitution mandates that, and I quote, "public
14 funds shall only be disposed of for public purposes pursuant
15 to law," and I end quote.

16 The FOMB makes no effort to evidence compliance with
17 every one of these key factual thresholds. By limiting its
18 briefing only to the single issue of whether the Commonwealth
19 lacks sufficient available revenue, the FOMB essentially
20 admits their failure. Accordingly, summary judgment cannot be
21 granted on this matter due to FOMB's inability to meet its
22 burden to show that there is no genuine issue of material fact
23 with respect to any of the requirements for activation of a
24 valid clawback.

25 Lastly, I would like to briefly address Counsel

1 Firestein and Counsel Kass' remarks regarding clawback. In a
2 nutshell, they assert that clawback is not an issue because
3 the impairment for the Contract Clause is based on the FOMB's
4 preemption/appropriation argument under Title II of PROMESA.

5 (Whereupon the San Juan courtroom was disconnected
6 from the teleconference call.)

7 (At 2:36 PM, the San Juan courtroom was reconnected
8 with the teleconference call.)

9 MS. NG: Eric can hear us. The AT&T is good, Judge,
10 right now.

11 THE COURT: I'm sorry. I'm hearing voices but not
12 words. It's very faint.

13 MS. NG: Judge, can you hear me?

14 THE COURT: Yes. Who is that speaking?

15 MS. NG: It's me, Lisa.

16 THE COURT: Okay.

17 MS. NG: Eric says AT&T is fine. He can hear us.

18 MS. TACORONTE: Judge, can you hear me?

19 THE COURT: All right. And someone else just said,
20 "Judge, can you hear me," so who is that?

21 MS. TACORONTE: It's Carmen, in San Juan, Your Honor.

22 THE COURT: Great. So I think we are all back in the
23 same loop and we can proceed.

24 COURT REPORTER: Your Honor, would you like me to
25 read what was being said before we were dropped?

1 THE COURT: Yes. Actually, that would be helpful.
2 So if you will repeat from where Mr. Zouairabani was talking
3 about what Mr. Firestein and Mr. Kass said about clawback.

4 (Whereupon the court reporter read back the record
5 from page 143, line 1, to page 143, line 4.)

6 THE COURT: Oh, then you dropped. Okay.

7 So I will ask Mr. Zouairabani to come back and repeat
8 the end of his argument from that point.

9 MR. ZOUAIRABANI TRINIDAD: Yes, Your Honor. Attorney
10 Nayuan Zouairabani for the record. If I may?

11 THE COURT: Yes, please.

12 MR. ZOUAIRABANI TRINIDAD: So what follows that
13 portion is: What they failed to mention, however, is if the
14 Court were to reject the preemption/appropriation arguments
15 for the reasons already stated, the Court will be required to
16 address clawback to dispose of the FOMB's Contract Clause
17 allegations. Plus, contrary to the FOMB's assertion
18 otherwise, clawback is still very much in play in this
19 proceeding.

20 And that was the end of my portion.

21 THE COURT: Thank you.

22 And so, Mr. Firestein, then Mr. Despins said that he
23 was waiving the five minutes for the UCC and contributing them
24 to your time allocation, which means I have you, the Oversight
25 Board, down for 30 minutes now. And so, Mr. Firestein, are

1 | you ready to proceed now?

2 | Mr. Firestein, are you here?

3 | (No response.)

4 | THE COURT: Lisa, can you hear me?

5 | MR. BIENENSTOCK: Your Honor, this is Martin
6 | Bienenstock. If it's okay, I'll start, and I'll hand things
7 | off to Messrs. Firestein and Kass.

8 | THE COURT: That's fine. I'm just glad we haven't
9 | all lost each other again.

10 | MR. BIENENSTOCK: Okay. Shall I start now?

11 | THE COURT: Yes, please.

12 | MR. BIENENSTOCK: Okay. Good afternoon, Your Honor.
13 | Martin Bienenstock of Proskauer Rose, LLP, for the Oversight
14 | Board, as Title III representative for the Commonwealth.

15 | I'm going to go mostly in order of the points raised
16 | in the opposition this morning, Your Honor. The first issue
17 | related to the Monolines contending they need discovery and a
18 | trial, because they have a lien not only on money in the
19 | Sinking Fund, et cetera, at HTA, but also on money that should
20 | have been sent there.

21 | And the reason that's wrong -- there are many reasons
22 | why that's wrong. First, the only entity that granted a
23 | security interest to them is HTA, and it could not grant a
24 | security interest in funds it didn't have. Second, they base
25 | this on a 2002 Security Agreement which the Court already

1 determined was unauthorized. Third, even if it had been
2 authorized, the expensive grants of not only funds in the
3 Sinking Fund but funds that should be there was beyond the
4 resolution authorizing the deal in the first place, and,
5 therefore, would have been ineffective.

6 The next point I want to address is the Moratorium
7 Orders. Mr. Natbony admitted that, as evidence of why money
8 was not funneled to the instrumentalities, were Commonwealth
9 documents saying not to, whether the orders or the statutes,
10 and I guess -- well, whatever he got in discovery indicating
11 that was the case. That's not the issue here.

12 From the time that the statutes were preempted, that
13 is the cause, at least the legal cause of not transferring.
14 And at the latest, that would be the commencement of the Title
15 III case for the Commonwealth. And if we were to go not only
16 by Title III but by the preemptive provisions of Title II,
17 then it could be as early as the creation of the Oversight
18 Board and the imposition of the first certified budget. But I
19 want to be clear.

20 THE COURT: Mr. --

21 MR. BIENENSTOCK: So before then --

22 THE COURT: Mr. Bienenstock.

23 MR. BIENENSTOCK: Before those two things happened,
24 the cessation of the money was not due to PROMESA, because
25 PROMESA didn't exist. And they have said they don't have a

1 claim for that within the meaning of the Bankruptcy Code; they
2 are only entitled to equitable and declaratory relief. Well,
3 the equitable and declaratory relief in the case law and in
4 *Von Hoffman*, that some of the Monolines are fond of citing, is
5 you nullify the offending statute. And as I explained
6 earlier, the Board has no problem with that here.

7 I assume that when they say they have no claim but
8 they have an entitlement to equitable relief, they are not
9 being cute and clever and saying, well, the equitable relief
10 we're entitled to is the payment of all the money, because
11 that would mean they do have a claim because the Bankruptcy
12 Code defines claim as right to payment.

13 So it really doesn't matter before Title III what the
14 cause was. At best, if their contractual obligations were
15 impaired, they would have a pre-petition unsecured claim for
16 that impairment. But since all of the Commonwealth executive
17 orders and moratorium laws went out of their way to preserve
18 all the creditors' rights to principal and interest, et
19 cetera, and so forth, our point is their contractual
20 obligations were intact.

21 What all this, all these statutes and orders amounted
22 to was nothing more than the debtor defaulted. And no matter
23 how you look at it, at best, it can result in a pre-petition
24 unsecured claim, which they say they don't have. They only
25 want declaratory and equitable relief.

1 Mr. Natbony next mentioned that the Fiscal Plan
2 didn't identify essential services; therefore, its
3 certification doesn't count. And he wants discovery on that,
4 and that to be the subject of a trial. There is no
5 connection, though, as to what suddenly puts the Fiscal Plan
6 into play in connection with the Monolines' Proofs of Claim.

7 To the extent they had collateral, they've asserted
8 secured claims. They've asserted unsecured claims, priority
9 claims. None of it depends on a fiscal plan. They've listed
10 all their entitlements. And even if they got a list of
11 essential services, they can't do anything about it, because
12 the Court -- the Court is told by PROMESA, 106(e), the
13 certification of fiscal plans can't be -- is outside the
14 Court's jurisdiction.

15 On Section 544(b), Mr. Natbony says a trustee under
16 301(c)(7) is not a trustee in bankruptcy for purposes of the
17 Uniform Commercial Code in Puerto Rico. Suffice it to say we
18 beg to differ. What other trustee is there in this case than
19 a Bankruptcy Trustee, a Title III Trustee?

20 Insofar as their statement that I misunderstood their
21 argument about the deposit account, the bottom line is this:
22 They cannot have a security interest in a deposit account
23 without a perfected security interest, without a Deposit
24 Account Control Agreement, a DACA, unless they had a perfected
25 security interest in cash, either by possession or by an

1 authenticated statement of the Commonwealth.

2 And as I pointed out in my early part of my opening,
3 the statutes they point -- the Monolines point to give them
4 that authenticated security interest say the money is being
5 held for the benefit of HTA to use for its corporate purposes,
6 not for the benefit of the bondholders.

7 As far as the *Kentucky Employees* case, suffice it to
8 say, from its very outset, it relies on Section 959(b). But
9 the Monolines' point, they contend it doesn't rely on 959(b),
10 that that's an ancillary issue, and that what it really says
11 is statutes have to be obeyed, even in bankruptcy.

12 I guess that's where the rubber hits the road here,
13 Your Honor. If they are right, then I suppose all creditors
14 from now on of municipalities will require the states and the
15 municipalities to pass laws that say all debt shall be paid
16 timely, no matter what, or just all debt shall be paid timely.
17 And then, according to the Monolines, they all have to be
18 specifically performed, which is the equivalent of giving them
19 a super priority during a bankruptcy in contradiction of what
20 the Bankruptcy Code provisions and Title III say. And I think
21 simply to state their proposition is to refute it.

22 To clarify something that came up this morning and
23 was raised by some of the speakers, while we are -- we, the
24 Board, as the Commonwealth's Title III representative, are
25 primarily concerned, and we brought these Complaints and

1 Summary Judgment Motion to pave the way for a plan of
2 adjustment, and for that, we need to know the amount of
3 secured claims, because they have to be paid the value of
4 their collateral, we have asked in several instances for
5 disallowance of the unsecured claims. But as I explained this
6 morning, what I carve out of that is, to the extent they have
7 unsecured claims for the non-impairment statutes, where the
8 statute says to all holders of bonds that the transfers shall
9 not be affected adversely to the instrumentality, those
10 unsecured claims we're not asking be disallowed at this time.

11 I want to emphasize, on the preemption point, the
12 different speakers took different approaches to this,
13 including the DRA Parties just now, but from the
14 Commonwealth's point of view and the Oversight Board's,
15 preemption is a preemption of one statute by a Federal
16 Statute. It's not a fiscal plan. It's not a budget. It's
17 not something else. It's a statute. And that makes a
18 difference here. Because we've said, for instance, 202, which
19 gives the Oversight Board budget authority, preempts these
20 statutes.

21 Now, why does it preempt them? Because 202 says the
22 Oversight Board should determine what to spend money on, and
23 these pre-PROMESA and pre-petition statutes purport to make
24 their own decisions on what to spend money on, inconsistent
25 with letting the Oversight Board determine. That's it.

1 That's what preempts these statutes, not the actual budget
2 that the Oversight Board actually determines later.

3 More importantly, Title III preempts all statutes
4 that would purport to pay pre-petition -- pre-petition debt.
5 And Your Honor asked the question earlier about the timing of
6 how long does the preemption last, and in the context of 202,
7 because the Board's budgetary power doesn't last forever, I
8 was thinking and answering in respect of, well, how long does
9 it last? It might last longer than the debt is repaid under
10 the Title III Plan, etc.

11 But I think the way to answer that question is Title
12 III deals with the debt. It would be completely inconsistent
13 with PROMESA and Title III for the debt to be dealt with under
14 a plan of adjustment and then for a statute to pop up
15 providing for additional payments to HTA to the benefit of its
16 creditors. So, from our point of view, because of Title III,
17 any debt dealt with in the Title III preempts forever
18 application of statutes that are intended to pay that debt.

19 THE COURT: And so are you saying that there has not
20 yet been and will not be, until confirmation of a plan, a
21 forever preemption of the statutes, or that the Title II
22 preemption somehow goes year to year but leaves a subsisting
23 liability that then gets dealt with in the plan along with the
24 future liability? What is it for --

25 MR. BIENENSTOCK: I'm saying that, in the same way

1 the Board's power to decide what expenses to authorize
2 preempts the relevant statutes here, the Title III, which
3 determines how to deal with debt, preempts the statutes, and
4 preempted them as of the time PROMESA was enacted and the
5 Board was created.

6 That's what's going to determine how to pay the debt,
7 not contrary statutes. Otherwise, any municipality could pass
8 a law saying, after the bankruptcy, we're going to pay off --
9 we shall pay X, Y, and Z debt. That would totally gut the
10 purpose of the debt restructuring statute.

11 THE COURT: But what if Title III was never invoked?
12 What if you ended up having a wonderful, happy experience
13 under Title VI, or for some reason the Title III was
14 discontinued? So is there a bringing and, you know, departing
15 Title III preemption from the time that PROMESA is enacted?

16 I just don't really understand how that would work.

17 MR. BIENENSTOCK: Well, if Title VI resolves debt for
18 this purpose, the same as Title III, so I think that would
19 eliminate the statute forever, certainly from the time it did
20 that. If the Title III case were dismissed, then I could see
21 an argument that the statute, the preempted statute would no
22 longer be preempted. But if the Title III case or Title VI
23 results in a restructuring of debt, statutes purporting to pay
24 that debt could never be reactivated, because that would undo
25 all the work of the Title III or the Title VI.

1 THE COURT: And when you say Title III preempts as of
2 the date PROMESA was enacted, where here the Commonwealth
3 didn't start its Title III until a year after PROMESA was
4 enacted, what was the situation vis-a-vis your Title III
5 preemption construct in 2016 and early 2017?

6 MR. BIENENSTOCK: Well, at that time, Your Honor, the
7 reason I used the earlier date was that the Oversight Board
8 was given budget authority to determine what to spend money
9 on, and that preempted the statutes. Additionally, once the
10 Title III was commenced, obviously it controlled how and --
11 how this debt would be paid.

12 THE COURT: Thank you.

13 MR. BIENENSTOCK: The non-entrenchment issue was
14 raised and questioned as to its relevance. Its relevance is
15 simply that the statutes they're referring to can be repealed.
16 They're definitely not enforceable against the current
17 legislature's, but they don't really need to be repealed
18 because 202 and Title III preempt them anyway. So it would be
19 double duty in effect, or belt and suspenders at best.

20 *Von Hoffman* was a Contract Clause case outside of
21 bankruptcy. That's why there's equitable relief. It doesn't
22 stand for the proposition that, in bankruptcy, statutes get to
23 be specifically enforced with mandamus, as Ambac urged. They
24 have a pre-petition, unsecured claim at best for the lack of
25 transferring the money to the different instrumentalities.

1 Under Section 407, Your Honor, the reason summary
2 judgment is appropriate is it's simply that the first prong --
3 I think everyone agrees that there needs to be property
4 transferred of a territorial instrumentality. And the only
5 way the Monolines get to satisfy that is to say Your Honor was
6 wrong on the Stay Hearing and they have a security interest in
7 Commonwealth property. But then they also lose on the second
8 prong, saying that there was a transfer. What they're
9 complaining about is there was no transfer, and the argument
10 that there was a transfer between Commonwealth bank accounts,
11 whether or not they had different restrictions on them, is a
12 red herring, because -- or a straw man, because the transfer
13 between the bank accounts caused no harm to anybody.

14 So they're just trying to check the box, to say there
15 was a transfer, but that transfer between bank accounts is not
16 what is being complained about. What is being complained
17 about is there was no transfer to the instrumentality.

18 On the second prong of 407, we stand on what I said
19 earlier about their legislative history having no validity for
20 the reasons I mentioned earlier. I think, frankly, that was
21 accentuated when the argument was made by Ambac that the fact
22 that Congress did not change the legislative report after
23 Congressman Grijalva made his statement in the Congressional
24 Record shows Congress agreed that the legislative report -- I
25 am not aware of any time that happens. That's what

1 Congressional Reports are for.

2 But the real reason why they lose on this point is
3 that the statute is clear. It says what it says. It requires
4 a transfer over a territorial instrumentality, and they don't
5 have it. They're asking the Court to rewrite the statute for
6 their own purpose.

7 On the issue of the Contract Clause, as I mentioned
8 earlier, we're taking them at their word that they have no
9 claim and they're not going to come around the back end and
10 say, well, they had a claim for an equitable relief in the
11 form of money. So basically, they have, at best, an unsecured
12 claim for the -- any Contract Clause impairment that existed
13 up to the Title III case being commenced.

14 Okay. They had a general -- pre-petition, general
15 unsecured claim. For the purposes for which we brought the
16 Summary Judgment Motion, that would be an excellent ruling.
17 And the amount of that claim can be quantified at any time.
18 What we ask for is they don't have any secured claims.

19 Once the Title III case commenced, and at the latest
20 -- it probably doesn't matter whether it was a few months
21 earlier or later. Once the Title III case commenced, it was
22 Title III that prevented payments to the instrumentalities on
23 the pre-petition obligations, and the statutes --

24 THE COURT: And that's because the Oversight Board
25 didn't consent to them being paid? Title III and 303 preserve

1 Commonwealth power, and 305 allows the Oversight Board to
2 consent to expenditures. And there's no 363. So what is it
3 in PROMESA that absolutely prevents the payments from being
4 made?

5 (No response.)

6 THE COURT: Are you still there? Oh, no.

7 Can anyone hear me at all?

8 MR. FIRESTEIN: Yes, Your Honor. This is Michael
9 Firestein. I can. Can you hear me?

10 THE COURT: I can hear you.

11 MR. FIRESTEIN: Well, I will tell you that the
12 dashboard, just so you know, the dashboard like -- I wasn't
13 even on it, and it was randomly muting me and kicking me off.
14 So there's some -- there is a gremlin amidst.

15 THE COURT: Oh, boy. Ms. Ng, can you hear
16 Mr. Firestein and me?

17 MS. NG: Yes, I hear you, Judge. I don't see
18 Mr. Bienenstock on anymore, so he may be trying to log back
19 in.

20 THE COURT: Okay. And you still see other people on
21 the dashboard?

22 MS. NG: Yes.

23 THE COURT: Okay. So let's wait and see if
24 Mr. Bienenstock comes back.

25 MS. NG: Amy, can you hear us?

1 COURT REPORTER: Yes, Lisa. I'm still here. Thank
2 you.

3 THE COURT: Mr. Firestein, can you text
4 Mr. Bienenstock and see where he is in the process?

5 MR. FIRESTEIN: Well, actually, I cannot text him,
6 but I know there's people who are on this line that surely
7 can.

8 THE COURT: Okay. Whoever can text Mr. Bienenstock,
9 please do.

10 MR. BIENENSTOCK: Your Honor.

11 THE COURT: Yes.

12 MR. BIENENSTOCK: I'm terribly sorry. I don't know
13 how or why I was disconnected, but I was.

14 THE COURT: All right. Well, welcome back. What was
15 the last thing that you heard?

16 MR. BIENENSTOCK: I think -- I'm not sure if Your
17 Honor was asking a question. I think it was about -- I had
18 been addressing the contract, the timing of the Contract
19 Clause, and once the Title III case commenced, that was the
20 cause of any impairment.

21 THE COURT: Yes. And so let me see if I can
22 reconstruct my question. Yes. My question was in reaction to
23 your assertion that once the Title III case commenced, Title
24 III itself prevented payments being made on the debt. And I
25 was asking you what in Title III was an absolute prohibition,

1 | since 303 preserves governmental power. Was it the Oversight
2 | Board's determination not to consent to the payments being
3 | made that is the Title III prevention, or is it some other
4 | mechanism?

5 | And since we had this mix-up, I'm going to reset you
6 | at ten minutes left, because my clock says like 22 minutes.
7 | So I'll give you ten minutes. All right?

8 | MR. BIENENSTOCK: All right. But that -- does the
9 | ten include any time I'd want to give to my colleagues?

10 | THE COURT: It would.

11 | MR. BIENENSTOCK: Okay. Then I'm going to try to
12 | take less than five.

13 | But to answer your question, Your Honor, once Title
14 | III was commenced, it was up to the Oversight Board, as the
15 | Commonwealth's representative, whether to pay, from the very
16 | first instance. And that's what caused the nonpayment. Power
17 | over the Commonwealth's payment of prior debt was given over
18 | to the Oversight Board. That's the inconsistency between
19 | Title III for this purpose and the revenue statutes we're
20 | dealing with.

21 | THE COURT: And given the Oversight Board's decision
22 | not to authorize those payments, the Commonwealth couldn't do
23 | anything else and that statute couldn't --

24 | MR. BIENENSTOCK: But it wasn't so much the actual
25 | decision not to, and that might manifest the inconsistency or

1 the preemption, but it was the fact that the power to decide
2 was given to the Commonwealth through the Oversight Board and
3 taken away from the pre-petition statute that would otherwise
4 control.

5 THE COURT: Thank you.

6 MR. BIENENSTOCK: Okay. Thanks.

7 On the issue of acceleration, Your Honor, the fact is
8 that, in bankruptcy, you have to file your whole claim. So
9 the GO, General Obligation debt didn't file one year's payment
10 on their 18 billion of debt. They filed for 18 billion, and
11 that is the claim. And that gets treated under the Plan. So
12 that is the acceleration. Like it or not, the federal law
13 effectively makes all of the money owing, and under a plan,
14 you can figure out how you're going to pay it.

15 In terms of the argument that the litigants were
16 deprived of liens on money that would have been encumbered, we
17 previously cited to the Court -- I think *Las Vegas Monorail*
18 was one decision, the promises to secure are nothing but
19 unsecured claims.

20 The continued refrain we hear from the Monolines,
21 that government debtors have to comply with statutes, just
22 restates, you know, where the rubber hits the road. That
23 would mean any statute requiring payment of pre-petition debt
24 has to be paid in full as a priority over everything else,
25 notwithstanding that that's not what Title III or the

1 Bankruptcy Code provide.

2 Your Honor, the rest of my time I'd like to give to
3 Mr. Firestein.

4 THE COURT: Thank you, Mr. Bienenstock.

5 Mr. Firestein.

6 MR. FIRESTEIN: Yes, Your Honor. Can you hear me
7 now?

8 THE COURT: Yes. You have six and three-quarter
9 minutes.

10 MR. FIRESTEIN: Okay. I probably will yield a couple
11 of minutes to Mr. Kass, but let me just -- again, it's Michael
12 Firestein of Proskauer, on behalf of the moving party and the
13 Commonwealth here.

14 I just want to tick off a few things that relate to
15 some of the observations we heard about 56(d). One, I think
16 Mr. Natbony indicated that it was sufficient for them to
17 merely file a 56(d) request and that that was enough, and he
18 really only needed to ask for general information. I beg to
19 differ with that. I don't think that's what the law is.

20 I think the law is that it does require that
21 defendants, quote -- and this is again from *Bad Paper*, and
22 I'll give another cite as well, identify the specific facts
23 they seek or explain how the information they seek, if
24 collected, would suffice to defeat the summary judgment
25 motion. That was aptly cited in each of our responses to

1 | this, but -- and the *Bad Paper* case involved generalized
2 | requests for information regarding certain transactions
3 | similar to the requests that are made here. And that Court
4 | rejected those requests as akin to speculation, that there's
5 | some relevant evidence not yet discovered that will never
6 | suffice to support 56(d) motions. The First Circuit has
7 | likewise adhered to the same ruling and the same standard in
8 | the *Mattoon* case, which I believe we cited in our papers.

9 | Mr. Natbony also indicated that he -- or he took
10 | issue with the notion that, you know, the fact that we were --
11 | suggested that they file the fulsome opposition is somehow --
12 | you know, makes their filing of a 56(d) request improper.
13 | That is not what we argued. We didn't argue that a request
14 | for 56(d) relief, in the alternative, was improper. But what
15 | we did do was cite the case law, including the *C.B. Trucking*
16 | case, as well as the *Westernbank versus Kachkar*, and I hope
17 | I'm not mispronouncing it, in which the fact that a fulsome
18 | opposition has been filed can militate against the notion that
19 | 56(d), as an alternative request for relief, is something, you
20 | know, that is necessary. And we'll stand by our citation to
21 | that authority, but I wanted to be clear about what our
22 | argument actually was.

23 | In addition, Mr. Natbony made an observation that we
24 | needed a full or fuller record of some kind to interpret
25 | statutes. I don't see any information that they've requested

1 that is going to go to the issue of what the interpretation of
2 the statutes should be that is different than what the Court
3 had in front of it and was able to clearly define and
4 interpret, which is the Court's prerogative in the context of
5 the Lift Stay.

6 I'm not going to reargue those points. The Court's
7 position on those issues is pretty straight forward. But I do
8 take issue and disagree with the notion that somehow a bigger
9 record of some kind is going to make for a better or different
10 interpretation, which there's no information to suggest that.
11 And indeed, the type of information that they are talking
12 about is the type of information that the Court has already
13 found wanting in terms of value relating to interpretation.

14 And not to be repetitive of it, but the notion of
15 flow of funds or accounting issues and the emphasis on Fund
16 278, you know, I think the *McGirt* case that came out this year
17 from the United States Supreme Court basically stands for the
18 proposition that historical practice is simply not relevant to
19 statutory interpretation. And the Court has already reached a
20 similar conclusion.

21 Similarly, the rationale for -- or the basis upon
22 which the failure to transfer the HTA allocable revenues, I
23 mean, they put the cart before the horse. They don't have a
24 protected lien. There's no property interest that exists
25 here, which we -- reaffirmed by the Court in the 926 Order, at

1 | least as it relates to HTA. So we stand by the proposition
2 | that the absence of relevance as to why the money was
3 | transferred is the correct conclusion. The issue is, is there
4 | a consequence for not having transferred that money.

5 | Focusing on PRIFA for a moment, I know that we had
6 | some discussion with the Court about the Trust Agreement --

7 | (Sound played.)

8 | MR. FIRESTEIN: -- and I indicated that they rely on
9 | that for the proposition that -- for their own positions.
10 | Well, the Trust Agreement only goes to -- in any event, the
11 | Trust Agreement only goes to the relationship between the
12 | Trustee, the bondholders and PRIFA. The Commonwealth isn't
13 | even a party. So the rights, if any, that would exist
14 | relative to the Commonwealth derive from the Enabling Act.

15 | And to the discussion you had with Ms. Miller
16 | relating to the issues about the original Trust Agreement or
17 | other edifications of this, the fact of the matter is that I
18 | believe it was Ms. Miller's Declaration that attached to the
19 | motions that they filed in January, what they believed to be
20 | true and correct copies of the Lift Stay. So the fact that
21 | they are moving back and forth between this issue in order to
22 | create some sort of factual dispute I think goes directly to
23 | the issue of needing to have something specific that they had
24 | in mind, rather than just throwing dust up against the wall.

25 | The last point that I want to make has to do with

1 what their right was to pursue discovery. They talk about
2 their -- what they want to have, but what they don't dispute
3 is that they didn't do anything about it. They simply didn't
4 ask in any way, shape or form. And there is nothing that
5 contradicts my declaration relative to what occurred
6 concerning the entire time in which these motions have been
7 pending.

8 And with that, Your Honor, in the absence of
9 questions, I will yield to Mr. Kass for the remaining moment.

10 THE COURT: Thank you.

11 Mr. Kass, talk fast.

12 MR. KASS: Good afternoon, Your Honor. Colin Kass
13 for the Oversight Board.

14 In light of the limited amount of time, I just want
15 to make one point relating to CCDA. During the defendants'
16 argument, they pointed to a footnote in the Oversight Board's
17 Reply Brief where we note that, at most, defendants have bare
18 legal title to the funds in the Tourism account. They took
19 that quote out of context. What we were saying is that --

20 (Sound played.)

21 THE COURT: You can finish.

22 MR. KASS: May I finish, Your Honor?

23 THE COURT: Yes.

24 MR. KASS: What we were saying was, at most, they
25 have a possessory interest in these funds. The ownership of

1 | these dollars remains with the Commonwealth. And that is what
2 | Section 407 is getting at, is who actually owns the property.

3 | And if you think about what defendants are seeking,
4 | they are not seeking to get the value of the Tourism Company's
5 | possessory interest. They're seeking to deprive the
6 | Commonwealth of the value of its own property, which is the
7 | ownership in the occupancy taxes. And we think that is
8 | improper.

9 | And with that, I'll yield.

10 | THE COURT: Thank you very much.

11 | I'd again like to thank all counsel for these very
12 | well thought out, detailed, and well-articulated arguments
13 | that will be quite helpful to me in tackling the appropriate
14 | disposition of this motion practice. The Motion is taken
15 | under advisement.

16 | This concludes today's hearing. The next scheduled
17 | hearing date is the October Omni, which is scheduled for
18 | October 28th, 2020. And that hearing will occur
19 | telephonically as well. The Court will issue a procedures
20 | order closer to the date of that hearing.

21 | I extend my sincere thanks to the court staff in
22 | Puerto Rico, Boston, and New York, and to all who participated
23 | today. I wish you all good health and continued safety in
24 | these times. So stay safe and keep well, everyone. And I
25 | will look forward to the next hearing.

1 We are adjourned.

2 (At 3:16 PM, proceedings concluded.)

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1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3
4 I certify that this transcript consisting of 167 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 September 23, 2020.

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S/ Amy Walker
Amy Walker, CSR 3799
Official Court Reporter

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